(1) 89-459

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,
Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, a union grievance which seeks damages for a claimed breach of a collective bargaining agreement's successor clause—purportedly requiring a merged airline to recognize the union as the representative of a minority group of employees—after a merger—raises issues of employee representation within the exclusive jurisdiction of the National Mediation Board.

2. Whether the National Mediation Board's decision terminating the union representation certification of the acquired carrier's union, as of the date of the merger, renders moot the union's request to arbitrate a grievance involving representation issues under a successor clause.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit appear in the caption of the case in this Court, except Western Air Lines, Inc. It should be noted, however, that Western Air Lines, Inc., which was the original appellee in these proceedings, ceased to exist when it was merged into Delta Air Lines, Inc. on April 1, 1987.*

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* Pursuant to Rule 28 of the Rules of this Court, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; Gatwick Handling, Ltd.; and SkyWest, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Delta Air Lines, Inc. respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), entered in the proceedings below on July 18, 1989.

OPINIONS AND ORDERS BELOW

The opinion of the D.C. Circuit, entered on July 18, 1989, is reported at 879 F.2d 906, and is reproduced in Appendix A. Copies of that court's preliminary orders of June 6, 1988, and March 31, 1987, are unreported and are reproduced in Appendices B and C. The final opinion and judgment of the D.C. Circuit reversed the judgment of the United States District Court for the District of Columbia. A copy of the order and opinion of the district court, which is reported at 662 F. Supp. 1, is reproduced in Appendix D.

JURISDICTION

The opinion and judgment of the D.C. Circuit were rendered in this case on July 18, 1989. This Petition is filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved is the Railway Labor Act, 45 U.S.C. §§ 151-88, specifically §§ 152, Fourth and Ninth, and 181. Those provisions are reproduced in Appendix N.

STATEMENT OF THE CASE

I. The Relevant Facts

This case arises from a labor dispute involving the 1987 merger of Western Air Lines, Inc. ("Western") into Delta Air Lines, Inc. ("Delta"). Respondent Association of Flight Attendants ("AFA"), which represented Western's flight

attendants prior to the merger, filed suit in the United States District Court for the District of Columbia seeking an order compelling Western to arbitrate AFA's grievance claim that Western was required to bind Delta to AFA's collective bargaining agreement with Western under the successor clause of that union agreement. AFA's grievance alleged that Western violated the successor clause by failing to secure Delta's agreement to be bound by AFA's union agreement and to recognize the AFA after the merger was completed. Western refused to arbitrate AFA's grievance on the grounds that it raised employee representation issues within the exclusive jurisdiction of the National Mediation Board ("NMB").

Prior to the merger, Delta employed more than three times as many flight attendants as Western. Those Delta flight attendants have opted to have no collective bargaining representative. Thus, after the merger, a large majority (greater than 75%) of the flight attendant craft or class was made up of original Delta employees who have never chosen to be represented by a union.

Pursuant to a September 1986 merger agreement, Delta acquired Western on December 18, 1986, at which time Western become a wholly owned subsidiary of Delta, operating as a separate carrier. On April 1, 1987, Western was legally and operationally merged into Delta and ceased to exist as a separate entity. The merger agreement required Western to honor its collective bargaining agreements as long as it operated as a separate carrier.

As Judge Gesell found in this case, "No layoffs [of Western employees] are contemplated, either before or after the merger." App D, 29a, 662 F. Supp., at 2. Delta offered postmerger jobs to all flight attendants without requiring any of them to move. Since the wages and benefits paid by Delta were significantly higher than Western's, Delta gave substantial pay increases to most Western employees after the merger, including flight attendants. *Id.*, at 29a, 662 F. Supp., at 2.

In the merger agreement, Delta also voluntarily agreed to provide Western employees with significant labor protective provisions ("LPP's") at least as favorable as the standard LPP's imposed by the Civil Aeronautics Board ("CAB") in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1971), which the Department of Transportation ceased imposing after airline deregulation. App. D, 29a, 662 F. Supp., at 2 n.2. The LPP's include a fair and equitable integration of seniority lists. In accordance with the LPP's, the former Western employees represented by the AFA have been integrated with the original Delta employees.

II. The Proceedings Below And In Related Litigation Before This Court

AFA filed this action on January 8, 1987, to compel arbitration of a labor grievance. AFA contended that under the labor agreement's successor clause Western must require Delta to be bound to AFA's labor contract and recognize AFA as the representative of Western's flight attendants after the Delta-Western merger. AFA characterized this as a "minor dispute" under the Railway Labor Act, involving contract interpretation which should be arbitrated before Western's System Board of Adjustment. Western refused to arbitrate on grounds that the grievance actually raised a representation dispute that lay within the exclusive jurisdiction of the NMB.

On February 20, 1987, Judge Gesell granted summary judgment for Western, finding that this dispute was within the NMB's exclusive jurisdiction:

> Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA. . . .

> For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA.

App. D, 31a-32a, 662 F. Supp., at 3 (footnote and citations omitted). AFA then asked the D.C. Circuit for an injunction to compel arbitration pending appeal, which that court denied on March 31, 1987. App. C, 26a.

On June 29, 1987, the D.C. Circuit granted AFA's unopposed motion for stay pending this Court's disposition of Delta's petition for certiorari in the related litigation initiated by two other Western unions in the Ninth Circuit. AFA's motion acknowledged that the Ninth Circuit litigation "grows out of the same transaction as in the instant case," and that it "raises the same legal issue as is posed here, namely, the arbitrability and enforceability of a successorship provision in a collective bargaining agreement under the Railway Labor Act. . . ." AFA Motion to Stay Briefing Schedule, at 1-2 ("Motion for Stay").

In the Ninth Circuit litigation, two other Western unions filed actions in the Central District of California similar to AFA's. They sought to compel arbitration of grievances over the successor provisions in their labor agreements, encompassing damages and other relief, the same order sought by AFA here. Both actions were dismissed by the California district court on the same jurisdictional grounds cited by Judge Gesell in the instant case. *See International Brotherhood of Teamsters v. Western Air Lines, Inc.*, No. 86-7921 (C.D. Cal. Feb. 13, 1987) (App. E, 34a-36a); *Air Transport Employees v. Western Air Lines, Inc.*, No. 86-8032 (C.D. Cal. Feb. 13, 1987) (App. F, 37a-38a).

On March 31, 1987, the Ninth Circuit reversed both decisions and issued an injunction compelling arbitration of the unions' grievances and enjoining the merger of Delta and Western pending arbitration. *IBTCHWA, Local Union No. 2702 v. Western Air Lines, Inc.*, 813 F.2d 1359 (9th

Cir.) (*"IBTCHWA I"*), *vacated and remanded*, 108 S. Ct. 53 (1987). Western and Delta immediately sought an emergency stay of the Ninth Circuit's order and injunction. On April 1, 1987, Justice O'Connor, Circuit Justice, granted the stay (App. G, 39a). On April 2, 1987, Justice O'Connor issued a written opinion declaring that:

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.

Western Air Lines v. International Brotherhood of Teamsters, 480 U.S. 1301, 1305 (1987) (*"Western v. Teamsters"*) (App. H, 44a-45a). Justice O'Connor reviewed the same "overwhelming and well-developed case law" earlier cited by Judge Gesell in the instant case, *id.*, at 45a, 480 U.S., at 1306, and commented favorably upon Judge Gesell's analysis and the D.C. Circuit's denial of AFA's request for an injunction pending appeal. *Id.*, at 46a, 480 U.S., at 1306-07. On April 6, 1987, this Court, without dissent, denied the unions' emergency applications to vacate Justice O'Connor's stay. 481 U.S. 1002 (1987). Delta then filed a timely certiorari petition, which was pending before this Court at the time of AFA's Motion for Stay in the instant case.

While that certiorari petition was pending and the instant case was stayed before the D.C. Circuit, on July 9, 1987, the National Mediation Board ("NMB") issued its decision revoking the employee representation certifications of all former Western unions, including AFA's, effective retroactively to April 1, 1987. *Delta Air Lines/ Western Air Lines*, 14 N.M.B. 291 (*"Delta/Western"*) (1987) (App. I, 50a-62a). On October 5, 1987, after the NMB's termination of the former Western unions' certifications,

this Court, again without dissent, granted Delta's petition for certiorari, vacated the Ninth Circuit's judgment and remanded those cases to the Ninth Circuit to consider the question of mootness. *Delta Air Lines, Inc. v. International Brotherhood of Teamsters*, 108 S. Ct. 53 (1987) (App. J, 63a). On August 18, 1988, the Ninth Circuit dismissed the actions as moot (including the damages claims) on the basis that "none of the relief sought in the original complaint is now available." *IBTCHWA, Local No. 2702 v. Western Air Lines, Inc.*, 854 F.2d 1178 (9th Cir. Aug. 18, 1988) (*"IBTCHWA II"*) (App. K, 64a).

Meanwhile, following this Court's remand to the Ninth Circuit, Delta moved the D.C. Circuit to dismiss the instant case on grounds of mootness, arguing that the decision of the NMB revoking AFA's certification supplanted any possible award of an arbitrator. Denying the motion, on June 6, 1988, the D.C. Circuit held the following:

> Although *Appellant's claim based on any right of continued representation is moot*, it is not clear whether an arbitrator could award damages for breach of the collective bargaining agreement. It is
>
> FURTHER ORDERED that the parties limit their briefs to the issue of whether an arbitrator could award damages to Appellant if the arbitrator finds that Appellee breached the collective bargaining agreement.

App. B, 25a (emphasis added).

On July 18, 1989, the D.C. Circuit issued a decision reversing the district court determination in favor of Delta and remanding the case to the district court to order arbitration of AFA's damages claim. The D.C. Circuit concurred with the Ninth Circuit's finding of mootness as to all of AFA's claims except those for damages. App. A, 6a-7a, 879 F.2d, at 909. The D.C. Circuit found that the NMB's action had not mooted AFA's claims for damages, *id.*, at 9a, 879 F.2d, at 910, and that the NMB's exclusive jurisdiction over representation disputes did not deprive

the district court of authority to order arbitration of the damages claims. *Id.*, at 23a-24a, 879 F.2d, at 917.

Delta moved for a stay of the D.C. Circuit's mandate pending certiorari so that the important legal issues could be resolved by this Court before the arbitration which Delta contends should not proceed. AFA concurred in the motion, and the D.C. Circuit granted it. (App. L, 66a)

REASONS FOR GRANTING THE WRIT

SUMMARY OF REASONS FOR GRANTING THE WRIT

The D.C. Circuit concluded that the court has jurisdiction to order arbitration of AFA's damages claim. The D.C. Circuit's decision conflicts with a long line of other circuit court decisions, all of which have concluded that courts (and arbitrators) do not have any jurisdiction in cases that involve representation issues and that such matters must be left to the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act. These cases have so held in a variety of situations, including some which are factually as well as legally indistinguishable from the instant case. The D.C. Circuit reaches its conflicting result because it incorrectly tries to separate the damages remedy that AFA now seeks from AFA's underlying claim of a contract violation, which necessarily involves a representation dispute. In order to award damages or any relief, an arbitrator would first have to make a finding on the representation issues involved in the contract violation alleged by AFA, *i.e.*, that the successor clause of the AFA/Western contract entitled AFA to be recognized by Delta as the representative of former Western flight attendants. Such a finding by an arbitrator, however, would assume that the arbitrator had the underlying jurisdiction to determine the rights and obligations of the parties with respect to representation. Any such finding would invade the exclusive jurisdiction of the NMB and would be directly at odds with the NMB's decision that AFA's right to represent Western's flight attendants was extinguished on April 1, 1987.

Further, the D.C. Circuit decision conflicts with the Ninth Circuit's decision in the parallel litigation with respect to this same Delta-Western merger. The D.C. Circuit found that the NMB's decision terminating the representation certifications of all of Western's former unions did not render moot the damages claims of the AFA under its successor clause, but the Ninth Circuit ruled that those same damages claims by two other unions were moot. The D.C. Circuit acknowledged this conflict. Thus, Delta is subject to two totally inconsistent rulings of law on the same issue in the same merger. It was this Court that correctly raised the mootness issue, vacating and remanding the parallel case to the Ninth Circuit to consider that question.

The resolution of these conflicts are of vital national importance to our critical air and rail transportation industries. Only this Court can resolve these conflicts and put right again this previously settled area of labor law.

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE JURISDICTION OF THE FEDERAL COURTS IN REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

A. The NMB Has Exclusive Jurisdiction Of All Employee Representation Disputes Under The Railway Labor Act And Every Other Court Of Appeals Decision On The Issue Has Concluded That The Courts Do Not Have Any Jurisdiction In Cases That Raise Questions Of Representation, Regardless Of The Context In Which They Arise

The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-63, regulates labor relations of the nation's railroads and, through Title II, 45 U.S.C. §§ 181-88, air carriers. Justice O'Connor, in related litigation arising out of this same Delta-Western merger, has summarized the types of disputes cognizable under the RLA as follows:

> The [Railway Labor] Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the ap-

> plication or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. § 184. . . .
>
> "Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by §6 of the Act, 45 U.S.C. §§ 156, 181. "Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under § 2, Ninth of the Act, the National Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §§ 152, 181.

App. H, 41a-42a, 480 U.S., at 1302-03.

The NMB has exclusive jurisdiction of all disputes regarding employee representation. 45 U.S.C. § 152, Ninth. This Court has expressly held that the sweeping jurisdiction of the NMB over representation disputes is exclusive. *See General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943); *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

The RLA contemplates that employees will be represented on a carrier-wide basis through crafts or classes of employees and that the majority of the employees in each craft or class may select a bargaining representative. 45 U.S.C. § 152, Fourth. The NMB has held on numerous occasions that it has no authority to split a craft or class or fragment a carrier's labor force:

> The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the *whole* of a craft or class employed by a carrier.

Pennsylvania Railroad Co., 1 N.M.B. 23, 24 (1937) (emphasis in original).

Applying this principle, the NMB has specifically held that upon the merger of two airlines, the representation certifications of unions of the acquired airline whose employees will constitute only a minority of the combined employee groups after the merger, are extinguished by operation of law at the time of the merger. *See Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986); *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980). More recently, in *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 ("*TWA*") (Apr. 10, 1987), the NMB reaffirmed these principles, but indicated that representation certifications are not formally extinguished as a result of a merger until the NMB so rules. Pursuant to these principles, the NMB revoked the representation certifications of all former Western unions, including AFA, retroactive to the April 1, 1987 merger date. *Delta/Western*, 14 N.M.B. 291 (1987) (*See* App. I, 50a).

The NMB also said that in view of the increasing number of mergers under deregulation it would develop new procedures for handling representation matters resulting from mergers in the near future. *TWA*, 14 N.M.B., at 241. Subsequently, on July 31, 1987, the NMB issued its *Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidation in the Airline Industry*, 14 N.M.B. 388 (1987) ("*Merger Procedures*"), formalizing its procedures for exercising its exclusive jurisdiction over representation issues in airline mergers. Carriers are now required to notify the NMB at the same time that they seek merger approval from the Department of Transportation or when they subsequently decide to merge after one has gained control of the other. *Id.*, at 390, 393. Thus, the NMB has demonstrated its intent, ability, and authority to resolve any and all representation disputes arising from airline mergers. Reemphasizing the NMB's statutory role in such matters, the *Merger Procedures* reiterate that "the NMB alone is vested with final decision-making authority over representation issues." *Id.*, at 388; *see also id.*, at 389.

The courts have long held that under the RLA courts and arbitrators have no jurisdiction over representation

disputes, regardless of the context in which they arise, or the relief sought (including damages). Prior to this litigation over the Delta/Western merger, an unbroken line of appellate decisions established that the courts must look beyond the superficial form of a complaint to determine whether, as here, it masks an underlying representation dispute. If representation issues are involved, the courts are required to dismiss the complaint for lack of jurisdiction. *See, e.g., Independent Union of Flight Attendants v. Pan American World Airways*, 836 F.2d 130 (2d Cir. 1988) (per curiam) (seeking arbitration of a claim that union's contract governed work at another acquired airline); *Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (pre-merger action by union from smaller merging carrier for expedited arbitration of grievance over contract violation); *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (seeking declaration that union's contract survived a merger); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 19 (2d Cir. 1981) (action to enforce union contract on carrier's newly established subsidiary); *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (seeking negotiation of employees' post-merger rights); *Flight Engineers International Association v. Eastern Air Lines, Inc.*, 359 F.2d 303, 307 (2d Cir. 1966) (action seeking reinstatement of replaced striking employees "flew in the teeth" of NMB's certification of a different union representing the replacement employees); *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (seeking declaration that union's contract with successor provision survived a merger); *Flight Engineers' International Association v. Eastern Air Lines, Inc.*, 311 F.2d 745, 746 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963) (seeking injunction requiring airline to bargain); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th

Cir.), *cert. denied*, 369 U.S. 885 (1962) (seeking to enjoin agreement between railroad and parent union). In all of these cases, the courts found that the union's action raised representation issues and dismissed for lack of jurisdiction. Nothing in those decisions indicated that their outcome was affected by the form of relief sought by the union.

B. The Present Litigation Involves A Representation Dispute Within The Exclusive Jurisdiction Of The NMB, Regardless Of The Relief Sought

AFA's action seeking to arbitrate contractual grievances related to its alleged right to maintain its representative status is simply an attempt to evade the NMB's exclusive jurisdiction over representation questions. AFA claimed that the successor provisions contained in its collective bargaining agreement required Western to bind Delta to recognize AFA as the bargaining representative of the former Western flight attendants and to honor the Western/AFA labor contract after the merger. Since the D.C. Circuit's initial ruling that "[a]lthough [AFA's] claim based on any right of continued representation is moot, it is not clear whether an arbitrator could award damages. . . if the arbitrator finds that Appellee breached the collective bargaining agreement" (App. B, 25a), AFA now seeks an arbitration limited to damages relief.

The D.C. Circuit decision would allow the AFA to take its damages request to arbitration. The court below would distinguish between that damages remedy and the underlying representation claim:

> AFA's claims for injunctive relief are now moot, and no resolution of the remaining damage claim could have any effect upon either the Delta-Western merger or the representation of Delta's employees. This dispute is over a sum of money: Delta has it, and AFA wants it; no other person, and no transaction, is affected by which of them ends up with it.

App. A, 18a, 879 F.2d, at 914.

This puts the cart before the horse. One must look at the underlying claim before one can look at the remedy. A court does not have subject matter jurisdiction over a claim that one party desires another's money. Such a claim, without a proper cause of action as a predicate, would be dismissed for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

In order to invoke a court's subject matter jurisdiction, a party must plead each of the elements of a cause of action that is within the court's jurisdiction. A cause of action founded upon breach of contract comprises four elements: a duty, a breach of the duty, proximate cause, and damages or injunctive relief. Similarly, a union's claim that it seeks a carrier's money would not, by itself, be subject to arbitration under the Railway Labor Act. The union must assert as a necessary element of its cause of action that the carrier had a duty to take some action, that it breached that duty, and that an arbitrator has jurisdiction to determine those issues. The remedy of damages is inextricably intertwined with the asserted duty and breach.

Here, AFA alleged that Western had a duty to bind a successor airline—in this case Delta—to recognize AFA's status as collective bargaining representative and its labor contract (or, under the alternate formulation of AFA's argument stated by the D.C. Circuit, that the merger was prohibited because of Delta's failure to agree to such recognition). Western (and Delta) disputed AFA's claim. That alleged duty is the subject matter of this dispute and of AFA's cause of action—the subject matter is not whether AFA can have some of Delta's money. The latter issue necessarily depends upon the former. That is, absent a finding of the alleged duty and a breach thereof, AFA would have no basis for any relief, including damages.

Any finding, whether by an arbitrator or a court, that AFA had a right to continued recognition would invade the NMB's exclusive jurisdiction over representation dis-

putes. One cannot separate the remedy which AFA seeks from its underlying representation claim, as the D.C. Circuit decision does.

The D.C. Circuit dismisses this argument by saying that, inasmuch as the merger was completed and the NMB already has ruled on the representation issues, a damage award could not interfere with or affect those matters. But the issue of subject matter jurisdiction does not depend upon whether a remedy can be devised that arguably will not "interfere" with the transaction. The issue is whether the adjudicator, be it a court or an arbitrator, has jurisdiction to determine the rights and obligations of the parties with respect to the disputed subject matter: here the asserted duty of Western to bind Delta to recognize the AFA contract and AFA as employee representative.

C. The D.C. Circuit's Decision In The Instant Case Conflicts With Every Other Appellate Decision Regarding The Effect Of Collective Bargaining Agreements On Employee Representation Issues In Airline Mergers and Acquisitions

In reviewing the Ninth Circuit's finding of jurisdiction and granting of an injunction compelling Western to arbitrate in the parallel litigation, Justice O'Connor discussed the long line of cases cited in Section A above:

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.
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> * * *
>
> The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely

> that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

App H, 44a, 46a, 480 U.S., at 1305, 1307. This Court subsequently granted certiorari, vacated the Ninth Circuit's decision and remanded to consider the question of mootness. App. J, 63a, 108 S. Ct. 53 (1987).

The Courts of Appeals of five circuits, the First, Second, Fifth, Sixth and Seventh, have ruled that the courts have no jurisdiction in actions to enforce union contracts in connection with airline mergers and acquisitions because such actions inevitably raise representation questions. The D.C. Circuit decision conflicts with these other circuits.

The Seventh Circuit's decision in *Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) ("*ALEA v. Republic*"), is especially instructive as its facts are indistinguishable from those here. In anticipation of a merger with Republic Airlines, Northwest Airlines agreed to recognize two of its own unions as representatives of the combined workforce after the merger was to take place. Before this "transition agreement" became effective, one of Republic's unions, the Air Line Employees Association ("ALEA"), brought an action prior to the merger against Republic and Northwest challenging the transition agreement as a breach of ALEA's labor contract with Republic. ALEA's complaint sought the same relief AFA sought here, "an order compelling expedited arbitration of its grievance challenging defendants' contract violations and preserving the *status quo* pending issuance of the arbitrator's decision." *Id.*, at 968.[1]

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[1] AFA's Complaint sought the same relief to "[o]rder Western to submit on an expedited basis to the jurisdiction of the System Board of Adjustment, sitting with a referee in accordance with the 1984 Agreement, to resolve the parties' dispute over the Company's asserted breach of Section 1(C)" and "if expedited arbitration before the System Board is not ordered, issue a

Thus, the Seventh Circuit had before it all of the same elements of the instant case, *i.e.*, a premerger contract action brought by the union against the premerger carrier to compel arbitration of a claim that the carrier violated the union's contract in the merger by not recognizing that union. The union there, like AFA here, sought to compel arbitration of an alleged contract violation, in which arbitration the union would be entitled to any appropriate relief, including damages. Nevertheless, unlike the D.C. Circuit, the Seventh Circuit affirmed the dismissal of ALEA's complaint for lack of jurisdiction:

> [T]he district judge's decision was in conformity with—as he put it—"the overwhelming and well-developed case law addressing issues similar to those presented in the instant complaint." . . . [W]e find no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits. . . . [*E*]*ven though the complaint was couched in terms of enforcing the collective bargaining agreement, the dispute was basically a representational dispute and therefore committed to the sole jurisdiction of the NMB.*

Id. (footnote and citation omitted) (emphasis added).

To the same effect is the Fifth Circuit's decision in *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983). After Texas International merged with the larger Continental Air Lines, Texas International's 1,800 Teamsters found themselves subsumed in an unorganized unit of 4,000 Continental employees, and Continental refused to recognize the Teamsters or their premerger agreement. Although

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preliminary injunction to preserve the *status quo* pending arbitration by the System Board of the parties' contractual dispute." (AFA Complaint, at 10, requests for relief). It should be noted that a complaint seeking an order compelling arbitration typically would not specify the nature of the relief sought in the arbitration. It is understood that, if the arbitrator has jurisdiction over a grievance, he may issue an order in the nature of injunctive relief, he may award damages, or both.

the Teamsters' declaratory action, like AFA's suit here, purported only to seek enforcement of the union's contract, the Fifth Circuit nevertheless held that the action for contract enforcement hinged on the underlying representation dispute. *Id.*, at 161. The court found as a consequence that it had no jurisdiction to intervene:

> Given the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements.

Id., at 164.

Since *Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964), the courts have recognized that placing a representation issue in the form of a contract dispute cannot oust the NMB of its exclusive jurisdiction. There the union sought to enforce its premerger contract, which contained a successor clause, with United's merger partner. The Sixth Circuit affirmed lack of jurisdiction:

> [A]lthough the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction "where 'validity' of the contract depends upon the merits of a representation dispute."

325 F.2d, at 579 (citation omitted).

The same principles of these cases apply here. The D.C. Circuit's decision compelling arbitration of AFA's damages claim would authorize and require an arbitrator, in order to award damages, to determine first whether under the successor clause of the union's contract AFA was entitled to representation status after the merger. Thus, the D.C. Circuit would erroneously allow an arbitrator to decide a representation issue within the NMB's exclusive jurisdic-

tion, when the NMB has already decided that representation issue against AFA. The D.C. Circuit decision simply cannot be reconciled with the other circuit decisions.

D. The D.C. Circuit's Attempt To Distinguish All The Other Circuit Decisions Is Unavailing

The D.C. Circuit decision attempts to distinguish all the "cited [circuit] cases, however, since in each one (with a single exception discussed more fully below), the union sought not damages, but rather a declaration or an injunction that would have given it an ongoing right of representation." App. A, 16a, 879 F.2d, at 913. None of the many circuit cases upholding the exclusive jurisdiction of the NMB support the distinction between injunctive relief and damages. Nor do those cases suggest that damages relief might be allowed or that the form of relief makes any difference. Indeed, a number of the decisions are directly contrary to the purported distinction.

In *ALEA v. Republic, supra*, discussed more fully *supra* at page 15, the Seventh Circuit was faced with a union's request for an order compelling arbitration of the union's grievance over contract violations in a merger, just as the D.C. Circuit faced here. The claims of contract violations that the union there sought to arbitrate would have entitled them to damages and any other appropriate relief, if the union established a contract violation in arbitration. Damages were just as much a part of the relief available to ALEA in arbitration in that case as they are to AFA in the instant case. Yet, the Seventh Circuit affirmed the district court's refusal to compel arbitration and its dismissal of the complaint for lack of subject matter jurisdiction because "the complaint was basically 'a representational dispute over which the federal courts do not have jurisdiction.' Order, No. 86 C 5239 (N.D. Ill. July 28, 1986)." 798 F.2d, at 968. The fact that the union in *ALEA v. Republic* would have been able to seek damages in arbitration (*see* note 1, *supra*) did not make any difference as to court jurisdiction in that case, any more than it should have in the instant case.

Another similar case is the Second Circuit's *Independent Union of Flight Attendants v. Pan American World Airways, supra*. There, the union sought to compel arbitration of its claim that Pan Am violated its labor contract by not applying that contract to another newly acquired airline. There again if the court had ordered the matter to arbitration as the union sought, the union would have naturally been able to seek damages in arbitration if it could establish a contract violation. Nevertheless, the district court refused to compel arbitration for any relief and dismissed for lack of subject matter jurisdiction, and the Second Circuit "affirm[ed] for substantially the reasons stated by the district court. 664 F. Supp. 156 (S.D.N.Y. 1987)." 836 F.2d, at 131. As the district court stated:

> It is also generally recognized that labor relations problems after a merger or acquisition in the airline industry may in some instances straddle the Railway Labor Act's seemingly discrete lines of demarcation. That is, what may be characterized as a "minor" dispute over the interpretation of a contract may also implicate concerns which are representational in nature. Where the issues thus overlap, a jurisdictional problem arises. The proper course for a court to follow in such circumstances is to allow the National Mediation Board "alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Texas International Airlines*, 717 F.2d at 164. *See also Western Airlines*, 107 S. Ct. at 1517.
>
> * * *
>
> [A] decision on the contract issues will necessarily implicate representational concerns.

664 F. Supp., at 158, 159 (S.D.N.Y.), *aff'd*, 836 F.2d 130 (2d Cir. 1988). The possibility of damages relief which existed there, just as it did here, did not change the lack of court jurisdiction.

That case involved circumstances quite similar to the instant case; by the time the case got to the Second Circuit

the NMB had resolved the representation issue. The Second Circuit noted in reference to the NMB's having asserted jurisdiction:

> We believe that these events underscore the correctness of the district court's decision that representation issues within the jurisdiction of the Mediation Board are implicated in the instant matter.

836 F.2d., at 131.[2]

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[2] Following the Second Circuit decision in *Pan American, supra*, another Pan Am union amended its contract grievance and complaint for a similar claim over work at the newly acquired Ransome Airlines, so as to seek only damages, and sought to compel arbitration of that claim. *Flight Engineers' International Association v. Pan American World Airways*, No. 87-6694, slip op. (S.D.N.Y. July 5, 1989) ("*FEIA v. Pan American*") (*See* App. M, 67a). The court expressly rejected the distinction the D.C. Circuit would draw and dismissed for lack of jurisdiction:

> Plaintiff's attempts to distinguish *IUFA* and the present case ultimately turn upon the notion that seeking contractual damages calls for a different result than seeking the right to perform the work; that representational issues are not implicated in the former action, while they may be in the latter. The Court does not find this distinction determinative, and it does not strike at the essence of the *IUFA* opinion. The *IUFA* Court stated, "[i]n essence . . . [t]he IUFA flight attendants in this case claim, just as the pilots in *Air Line Pilots Ass'n v. Texas Intern. Airlines*, 656 F.2d 16 (2d Cir. 1981) claimed, that work on a related carrier should be assigned to them." That same basic question underlies any claim for past damages here; the union claims that work on a related carrier should have been assigned to them.
>
> Plaintiff seeks to isolate the damage issue from a determination of representation, but the inquiries are inextricable. In order to determine whether the plaintiff is entitled to damages, the court must first conclude that the union is entitled to the work. Deciding the representation issue is a necessary predicate to determining whether a con-

The D.C. Circuit acknowledged that in at least one case, *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), "a court specifically noted a union's claim for damages, 656 F.2d at 17, yet required dismissal of the action on the authority of *Switchmen's Union.*" App. A, 21a, 879 F.2d, at 916. The D.C. Circuit, nevertheless, drew the following distinction of that case from the present case:

> The case is not on point, however, because the union there was seeking a *judicial* award of damages, not an order compelling *arbitral* resolution of its money claim.

Id., 879 F.2d, at 916 (emphasis in original).

That artificial distinction between whether the damages are sought from a court or an arbitrator is one that the same Second Circuit did not observe in its subsequent case *Independent Union of Flight Attendants v. Pan American World Airways*, 836 F.2d 130 (2d Cir. 1988). Nor was that distinction followed in *ALEA v. Republic, supra*, or in *FEIA v. Pan American, supra* (*see* note 2, *supra*). All of these cases, like the present case, involved union actions to compel arbitration of contract violations which, if proven, would have entitled the union to relief, including any damages. Nevertheless, the courts declined to order arbitration of anything because the courts and an arbitrator lacked jurisdiction since a representation issue was involved.

No circuit court has drawn or even suggested either of the distinctions created by the D.C. Circuit. Nor has any district court to our knowledge. The D.C. Circuit's decision creates a direct conflict among the circuits regarding the jurisdiction of the courts, of the NMB and of arbitrators in connection with representation issues arising under the RLA. This Court must resolve that conflict which is of critical importance in airline and railroad mergers and acquisitions.

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tractual remedy of damages is appropriate.

App. M, 74a-75a, slip op., at 9-10 (footnote omitted).

II. THE DECISION BELOW CREATES A CONFLICT BETWEEN THE D.C. CIRCUIT AND THE NINTH CIRCUIT IN PARALLEL LITIGATION WITH RESPECT TO THIS SAME MERGER REGARDING WHETHER A UNION'S CLAIM FOR DAMAGES FOR ALLEGED BREACH OF A SUCCESSOR CLAUSE HAS BEEN RENDERED MOOT

The National Mediation Board's decision terminating all the Western unions' representation certifications, including AFA's, renders this action moot. AFA has attempted to revive its action by claiming entitlement to damages for purported breach of the successor clause and arguing that such damages claim is not moot. AFA's damages claim, however, is inseparable from AFA's other claims for relief and, like those other claims, the damages claim was rendered moot by the NMB's decision.

The D.C. Circuit opinion notes:

> Delta points out that the Ninth Circuit held that the *Teamsters* litigation was moot, 854 F.2d at 1178, even though the plaintiff unions there argued, as does AFA here, that even if their claims for injunctive and declaratory relief were moot, an arbitrator could still award damages for breach of the successorship clauses in their CBA's.
>
> The argument was indeed made in the briefs before the Ninth Circuit, yet in its *per curiam* order dismissing the *Teamsters* action, the court made no mention of it.

App. A, 9a, 879 F.2d, at 910.

The D.C. Circuit had before it the parties' briefs to the Ninth Circuit, in which the damages argument was fully made by the unions and responded to. However, the Ninth Circuit, in *IBTCHWA II*, rejected that damages argument and dismissed the entire action as moot (including the damages claims) on the basis that "none of the relief sought in the original complaint is now available." App. K, 65a, 854 F.2d, at 1178.

The D.C. Circuit acknowledges the split between its decision and the Ninth Circuit's:

> Were the Ninth Circuit decision binding precedent in this circuit, it might give us greater cause for concern, since its judgment necessarily, if implicitly, rejected all of the arguments that the unions made.

App. A, 9a, 879 F.2d, at 910. The split between the two circuits could not present a clearer or a more compelling case for review: the two decisions involve the same merger and the same arguments, and the Air Transport Employees union even had the same successor clause language as AFA. *IBTCHWA I*, 813 F.2d 1359, 1360 (9th Cir.), *vacated and remanded*, 108 S. Ct. 53 (1987). Thus, Delta and this same merger of Western into Delta will be subject to two totally inconsistent rulings of law on the same issue. Only this Court can resolve this conflict.[3]

Before reaching the issue of a damage remedy, an arbitrator would first have to conclude that the successor clause bound Western to require Delta to recognize AFA and to assume AFA's collective bargaining agreement following the merger or, under the alternate formulation of AFA's arguments, that the merger was prohibited because of Delta's failure to agree to such recognition. Either interpretation presumes that AFA had a vested contractual right to continued representation of the former Western flight attendants following the merger. Absent an entitlement to such representation, AFA would have no basis

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[3] *See Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (denial of certiorari vacated and certiorari granted after conflict arose between two circuits on same legal issue involving same accident); *Maryland v. United States*, 381 U.S. 41 (1965) (certiorari granted to resolve conflict between two circuits on same legal issue involving same airline accident and same record); *International Typographical Union v. NLRB*, 365 U.S. 705, *rehearing denied*, 366 U.S. 941 (1961) (certiorari granted in both cases to resolve conflict between two circuits concerning lawfulness of same collective bargaining agreement clause).

for *any* relief, including a damage claim. Any holding that AFA or its contract was entitled to recognition by Delta, however, would eviscerate the NMB's ruling that AFA was *not* entitled to representation rights following the merger—and would encroach upon the NMB's exclusive jurisdiction. Thus, the D.C. Circuit's decision allowing an arbitrator to consider AFA's damages claim would affirmatively contradict the NMB's decision by authorizing damages for Delta's failure to recognize AFA, despite the NMB's determination that AFA was not entitled to recognition.

In addition, since the NMB's decision was retroactive to the date of the merger on April 1, 1987, there was never any period following the merger when AFA or its labor agreement was entitled to recognition or, conversely, any period when AFA could have been damaged by Delta's failure to recognize it. Even if Western had done precisely what AFA says the labor contract required, *i.e.*, obtained Delta's voluntary recognition of AFA and its union contract, any such recognition would have been futile. Any voluntary recognition by Delta would have been rendered unenforceable at its inception by the NMB's ruling, precluding any accrual of damages.

While the NMB has acknowledged that, under some limited circumstances, a carrier may voluntarily recognize a representative for a group of employees which does not constitute a system-wide craft or class, an NMB determination of the representative status of the overall craft or class supersedes any such voluntary recognition. *Seaboard Coast Line Railroad Co.*, 6 N.M.B. 63 (1976). As the NMB explained in *Galveston Wharves*, 4 N.M.B. 200 (1962):

> This restriction [that the NMB can only certify representatives on a carrier-wide basis] upon the Board does not preclude a carrier from voluntarily recognizing a particular union as a representative of a group or groups of employees which may not constitute a generally recognized craft or class. *But, when a dispute over representation is brought before the Board,*

> *the legislative procedures take precedent* [*sic*], *and the craft or class must be the controlling factor in its determination*. Therefore private representation agreements which do not conform to the recognized craft or class lines cannot be relied upon to modify the requirements of the statute.

Id., at 203 (emphasis added).

In the instant case, the NMB ruled that the merger of Western into Delta created a single transportation system and that AFA's certification as the representative of former Western employees was terminated on the date of the merger. Thus, any voluntary recognition previously obtained by Western from Delta (and any entitlement to damages for failure to do so) would have been superseded and rendered ineffective at the very moment it was supposed to become effective upon the merger.

The NMB decision in *Midway Airlines*, 14 N.M.B. 447 (1987), demonstrates that any voluntary recognition agreement entered into by Delta would have been ineffective at its inception. *Midway* involved the merger of Midway Airlines ("Midway") and its subsidiary, Midway Airlines (1984) ("Midway 1984"). Similar to Delta, Midway invoked the NMB's jurisdiction under the *Merger Procedures* to determine whether the certifications of the unions at Midway 1984 would be terminated by the merger.

Prior to development of the merger plans, however, a separate subsidiary, Midway Aircraft Engineering ("MAE"), had been set up to perform heavy maintenance work, and MAE was to remain a separate subsidiary following the merger. The labor agreement between the International Brotherhood of Teamsters ("IBT") and Midway 1984 required voluntary recognition of the IBT as the separate collective bargaining representative of certain Midway 1984 employees in Miami in the event that MAE took over operation of Midway 1984's Miami maintenance facility. 14 N.M.B., at 452-53. As part of the merger plans, the Miami facility and employees were to be transferred to MAE and, in accordance with the Midway 1984 agree-

ment, MAE recognized the IBT as the separate post-merger representative of the MAE Miami employees.

That voluntary recognition of the IBT by MAE was nullified by the NMB. The NMB, after examining the applicable factors, found that Midway, Midway 1984 and MAE constituted a single transportation system for purposes of the RLA and could have but a single representative covering each combined craft or class. 14 N.M.B., at 460. The Board held that the transfer of employees to MAE was ineffective to "deprive them or others of their rights under the Railway Labor Act" to have a single system-wide and craft-wide representative. *Id.*

The same outcome would have occurred in the instant case, even if Western had obtained Delta's recognition of AFA as the post-merger representative for the former Western employees. *Midway* demonstrates that any such recognition by Delta, and therefore any damages based on an entitlement to such recognition, would have been nullified effective April 1 by the NMB's decision.

Thus, the NMB decision does render moot AFA's entire action, including any damages claim. The Ninth Circuit rejected the same damages argument made by two other Western unions and dismissed their parallel actions as moot, after this Court remanded those cases to the Ninth Circuit precisely to consider the question of mootness.[4] Now that the Ninth and D.C. Circuits have decided that mootness question inconsistently, only this Court can resolve that conflict on the important legal question the Court itself raised.

III. THIS CASE PRESENTS ISSUES OF NATIONAL POLICY CRITICAL TO THE VITAL AIR AND RAIL TRANSPORTATION INDUSTRIES

AFA sought to avoid the mandatory NMB processes, including its employee election procedure, by seeking ju-

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[4] The question of damages had been raised before this Court by the Teamsters in the parallel actions in the Ninth Circuit in the Teamsters' Brief In Opposition to Delta's Petition for a Writ of Certiorari, at 12.

dicial and arbitral relief instead. By permitting such forum shopping and endorsing the intervention of the federal courts and labor arbitrators in representation disputes, the decision of the D.C. Circuit conflicts not only with the other circuits, but with the purposes of the RLA.

The D.C. Circuit decision permitting arbitration where representation issues are involved would allow the possibility or mere threat of an arbitrator's award of damages to unions to affect the outcome of such representation disputes and lead to fragmentation of the carrier's system-wide craft or class bargaining units provided for by the RLA. The imposition or mere threat of large damages awards by arbitrators over successor provisions purportedly governing representation issues in mergers and acquisitions would cause airlines and railroads to depart from the carrier-wide bargaining units provided for by the RLA. Damages can be just as influential of the parties' conduct as injunctive orders in causing such fragmentation.

The RLA provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Fourth. As the NMB explained in the *New York Central Railroad Co.*, 1 N.M.B. 197, 209-10 (1941), single representation for a craft or class on a carrier-wide basis was mandated by Congress, and splitting a craft or class contravenes the legislative directive. *See also Seaboard Coast Line Railroad Co.*, 6 N.M.B. 63, 64-65 (1976).

The NMB has consistently refused to fragment crafts or classes in exercising its jurisdiction in airline merger cases because of its RLA mandate to preserve employee relations stability in the vital transportation industries. It has also recognized that such fragmentation would preclude effective integration of a combined carrier's post-merger operations into a single transportation system. *Republic Airlines, Inc.*, 8 N.M.B. 49, 54-55 (1980). Effective integration of a post-merger labor force is impossible where some employees are represented by a union, while others,

performing the same job alongside union members, are not. Different work rules and terms and conditions of employment would apply to employees doing the same jobs at the same locations, and the inefficiencies of such an operation would be totally inconsistent with the original purpose of the merger. *See International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983).

Airline mergers, acquisitions, international marketing agreements and other related transactions have become and continue to be increasingly frequent events in the transportation industry, impelled in large part by heightened competition resulting from airline deregulation and by the recognition that the economy of the United States is increasingly linked to the international economic order. These transactions involve the integration of thousands of employees and hundreds of millions of dollars in assets. They affect systems which transport many millions of persons and tons of cargo annually. Any disruption to the effective employee integration of carriers in this vital industry, such as that threatened by the D.C. Circuit decision, is of national concern. The fragmentation of the adjudicatory processes and jurisdictional rules governing labor relations and collective bargaining obligations in this area, which would be authorized by the D.C. Circuit decision, is likewise of national importance. The decision would also inhibit the merger or acquisition of failing carriers leading to their disruptive demise. Moreover, because the decision is under the RLA, it could lead to similar effects upon the critical railroad industry as well.

The D.C. Circuit's decision cannot be viewed as merely an isolated, localized or technical construction of the law. Many airlines, such as Delta and Western, are subject to suit in several circuits, including the D.C. Circuit, because of their extensive operations. Further, most union contracts in the airline industry contain successor provisions, or other provisions that might be construed to empower arbitrators to decide representation issues, as the AFA would construe its contract here. The combination of these

factors not only subjects airlines to the disruptions caused by the D.C. Circuit's invasion of the NMB's jurisdiction, but also potentially subjects them to conflicting requirements in different circuits with regard to the *same* transaction.[5]

It was precisely to avoid such conflicts, and the resulting fragmentation of the carrier's labor force, that Congress vested exclusive jurisdiction over representation disputes in the NMB. It is intolerable for the NMB's exclusive jurisdiction over representation disputes arising in airline and railroad mergers to be recognized in the First, Second, Fifth, Sixth and Seventh Circuits, but not in the D.C. Circuit. It is just as intolerable for any damages claim in this merger to be moot in the Ninth Circuit, but not in the D.C. Circuit.

With so much at stake in the transactions involving air and rail carriers, the interests of the parties involved and those of the general public require that the issues raised here be definitely resolved, and that this previously settled area of labor law be put right again. The confusion caused by the D.C. Circuit's ruling in the instant merger alone is of national concern, but, even more broadly, the questions raised here are certain to arise again as pending and future transactions are consummated in the airline and

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[5] The instant merger illustrates how those inconsistencies arise. On the same day (March 31, 1987) that the Ninth Circuit issued its decision compelling arbitration of two other unions' grievances and enjoining the Delta-Western merger, the D.C. Circuit *denied* AFA's motion to compel arbitration pending appeal, which was brought on a legal theory identical to those advanced by the ATE and IBT unions in the Ninth Circuit. App. C, 26a. Later, after this Court vacated the Ninth Circuit's decision and remanded on the question of mootness, the Ninth Circuit found the entire case, including any damages claim, to be moot. But the D.C. Circuit decision here found that the AFA's damages claim was not moot, acknowledging that its decision was at odds with the Ninth Circuit's decision. Thus, Delta is presented with the situation that different results have been reached by two circuits on the same legal issue in the same merger.

railroad industries. It is therefore most important that the Court finally resolve these questions.

CONCLUSION

For the foregoing reasons, Delta respectfully requests that this Petition be granted.

September 15, 1989

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APPENDICES

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 15, 1988 Decided July 18, 1989

No. 87-7040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
APPELLANT

v.

DELTA AIR LINES, INC.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 87-00040)

Deborah Greenfield, for appellant. *David A. Borer* entered an appearance for appellant.

Scott A. Kruse, with whom *Michael H. Campbell*, *Paul D. Jones*, *Robert S. Harkey* and *William J. Kilberg* were on the brief, for appellee. *Baruch A. Fellner* entered an appearance for appellee.

Before: MIKVA, BUCKLEY, and D.H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

D.H. GINSBURG, *Circuit Judge*: This appeal arises from a labor dispute involving the 1987 merger of Western Airlines, Inc. into Delta Air Lines, Inc. The Association of Flight Attendants, which represented Western's flight attendants prior to the merger, filed suit in the district court seeking an order compelling Western to arbitrate the question whether Western breached the "successorship clause" in its collective bargaining agreement (CBA) with AFA by failing to bind Delta to the Agreement. The district court dismissed the action, holding that it involves a representative dispute under § 2, *Ninth* of the Railway Labor Act, 45 U.S.C. § 152, *Ninth*, and thus comes within the exclusive jurisdiction of the National Mediation Board. 662 F. Supp. 1, 3 (D.D.C. 1987).

The Union appealed and, as discussed below, on Western's motion, we held that some of AFA's claims for relief are moot. The questions now before us are (1) whether AFA's remaining claim is moot in light of the consummation of the Delta-Western merger and the subsequent determination by the NMB retroactively to extinguish AFA's certificate as bargaining representative for Western's flight attendants; and (2) if AFA's remaining claim is not moot, whether the district court has subject matter jurisdiction over it.

I. FACTUAL BACKGROUND

Prior to its acquisition by Delta, Western entered into a CBA with the Union, in which it recognized AFA "as the duly designated bargaining agent for the Flight Attendants in the employment of [Western]," and as re-

quired by the Act, 45 U.S.C. § 184, established a System Board of Adjustment "for the purpose of adjusting and deciding disputes which may arise under the terms of the Flight Attendant's Agreement . . . ." The agreement conferred upon the System Board "jurisdiction over disputes . . . growing out of grievances or out of interpretation of [or] application of any of the terms of the Flight Attendants' Agreement."

In addition to these essentially standard terms, the CBA contained the following successorship provision:

> This agreement shall be binding on any successor or merged Company or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) until changed in accordance with the Railway Labor Act, as amended.

In September 1986, Western entered into a merger agreement with Delta. Under the terms of this agreement, the merger would be affected in two steps: (1) on December 18, 1986, Delta would acquire 100% control of Western; and (2) on April 1, 1987, Western would be merged into Delta and cease to operate as a separate entity. The merger agreement provided that Western would honor its CBAs as long as they remained in effect, but did not purport to bind Delta to Western's CBAs.

In October 1986, AFA filed a grievance against Western. Specifically, AFA asserted that Western had a contractual duty to bind any successor to the CBA and that it breached that duty by agreeing to merge with Delta without so binding it. Western denied the grievance on the ground that it raised "representation issues within the exclusive jurisdiction of the National Mediation Board." AFA then submitted the dispute to the System Board, but Western refused to arbitrate.

Shortly after the first step of the merger took effect, AFA brought this action in the district court to compel

arbitration. In its complaint, AFA alleged that its grievance raised a "minor dispute" under the RLA and thus fell within the jurisdiction of the System Board. AFA sought an order directing Western to submit to expedited arbitration before the System Board for a determination whether it had breached the CBA, or in the event that the court did not expedite arbitration, preserving the status quo pending proceedings before the System Board.

In a memorandum submitted to the district court in support of its motion for summary judgment, AFA suggested that in the event the System Board were to rule in its favor, available relief might take the form of: (1) an order binding Delta to the terms of the CBA, "including the provisions recognizing AFA" as the exclusive representative of Western's flight attendants; or (2) an order requiring Western (a) to bind Delta to the CBA as a condition of its consummating the merger; and (b) to continue to operate as a separate entity; or (3) a declaration that without a term in the merger agreement binding Delta to the CBA, the merger could not occur; or (4) a determination that Western would be required to respond in damages in the event that it failed to bind Delta to the CBA.

In February 1987, the district court dismissed the action on the ground that AFA's complaint raised a "representation dispute" within the exclusive jurisdiction of the NMB. 622 F. Supp. at 3. Accordingly, the court held that it lacked jurisdiction to grant the relief sought by AFA, and dismissed the action with prejudice. AFA then filed the appeal now before us.

While AFA was pursuing this action in the district court, two other Western unions challenged the Delta-Western merger in the District Court for the Central District of California. They, too, sought both an order compelling arbitration of their claim that Western had breached the successorship clauses in their CBAs by fail-

ing to bind Delta to those agreements, and an injunction against consummation of the merger pending arbitration. The district court denied the requested relief, but the Ninth Circuit, on March 31, issued an order (1) directing the district court to enter orders compelling arbitration; and (2) enjoining the merger until either (a) completion of arbitration proceedings; or (b) entry of a stipulation by Western and Delta that the result of the arbitration would bind the successor corporation. *IBTCWHA v. Western Airlines, Inc.* (*Teamsters*), 813 F.2d 1359, 1364 (9th Cir. 1987). On April 1, however, the scheduled date of the operational merger, Justice O'Connor granted the carriers' *ex parte* application for a stay of the Ninth Circuit's order. 480 U.S. 1301 (1987) (in chambers). With the injunction thus lifted, the second step of the Delta-Western merger took place as planned, Western ceased to exist as a separate operating entity, and Delta refused to recognize either the CBA or AFA's status as the representative of the former Western flight attendants.

Shortly thereafter, Delta petitioned the NMB to "determine whether the Board's certifications of the Western labor organizations as collective bargaining representatives of the various crafts or classes at Western have been extinguished or terminated effective April 1, 1987." *In re Delta Air Lines, Inc. and Western Air Lines, Inc.*, 14 N.M.B. 291 (1987). On July 9, the NMB ruled that, the merger having eliminated Western as a separate operating identity, the certifications of the Western unions (including AFA) that represented a minority of their crafts in the merged entity were extinguished retroactively to April 1. *Id.* at 301.

On October 5, 1987, the Supreme Court granted *certiorari* in the *Teamsters* litigation, vacated the decision of the Ninth Circuit, and remanded the case for that court to consider whether it was moot. 108 S. Ct. 53 (1987). Thereafter, the Ninth Circuit, having requested and re-

ceived briefing on the issue of mootness, issued a *per curiam* order dismissing that action as moot. 854 F.2d 1178 (9th Cir. 1988).

Meanwhile, Delta had moved to dismiss this appeal on the ground that the NMB's retroactive decertification of AFA rendered it moot. Another panel of this court held, on June 6, 1988, that "Appellant's claim based on any right of continued representation" was moot, but that it was "not clear whether an arbitrator could award damages for breach of the collective bargaining agreement." Accordingly, the court denied Delta's motion but ordered the parties to limit their briefs to that issue. We turn now to the question left open in our order of June 6.

II. MOOTNESS

By virtue of "the constitutional command that the judicial power extends only to cases or controversies," a federal court lacks jurisdiction over a case that has become moot. *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969). A case is moot when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," but as long as some issues remain alive, "the remaining live issues supply the constitutional requirement of a case or controversy." *Id.* at 496, 497.

Even though a claim for injunctive or declaratory relief has been rendered moot by intervening events, which our June 6 order indicates happened here, a claim for damages keeps the controversy alive if that claim "is not so insubstantial or so clearly foreclosed by prior decisions that th[e] case may not proceed." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 8-9 (1978). *See also Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 459 (1957) (request for order to arbitrate not moot because arbitrator could award damages); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435, 441-42 (1984). Thus, the question whether the consummation of the merger and the decertification of

AFA rendered this case moot turns upon whether AFA appears to state a claim upon which it could recover in arbitration an award of damages against Western for breach of the successorship provision in the CBA.

Delta's principal argument is that in order to award damages to AFA, the arbitrator would first have to find that the CBA entitled the Union to represent Western's flight attendants after the merger; and that any such finding would contravene the NMB's determination to decertify AFA as of the merger date, thus "encroach[ing] upon the NMB's exclusive jurisdiction" over representation disputes. Since the NMB has already exercised its jurisdiction with respect to the Delta-Western merger, the argument runs, this court no longer has the power to grant the relief that AFA seeks, *viz.*, an order compelling Delta to arbitrate the Union's grievance.

Delta's argument is framed in terms of mootness, but it necessarily implicates the statutory question whether AFA's claim for damages is within the exclusive jurisdiction of the NMB, since if it is not, the predicate underlying Delta's argument would fail. Although that question could plausibly be resolved on mootness grounds, we think it is more properly addressed in terms of the district court's subject matter jurisdiction over the damage aspect of this case. *Cf. Marshall v. Local Union No. 639, Int'l Brotherhood of Teamsters*, 593 F.2d 1297, 1301 n.16 (D.C. Cir. 1979) (court may decide issue of subject matter jurisdiction where both jurisdiction and mootness questions are raised and where "the two are partially interlocked"). As set forth in Part III below, we conclude that the district court has jurisdiction over AFA's damage claim.

Delta argues in the alternative that even if the district court has jurisdiction, AFA cannot possibly demonstrate a claim for damages because (1) at all times prior to April 1, Western properly recognized AFA under the

terms of the CBA; and (2) the NMB's decertification of AFA divested it of any right it may have had to enforce its agreement with Western after that date. Delta also argues, in a similar vein, that even if the successorship clause of the CBA required Western to bind Delta to that agreement, Delta's voluntary recognition of AFA would, by virtue of the NMB's retroactive decertification of AFA, be "superseded and rendered ineffective at the very moment it was supposed to become effective upon the merger."

Neither of these arguments is entirely responsive to the issue. AFA does not now dispute that the NMB's decertification order deprived it of any right to represent Western employees beyond the April 1 merger date, and this court has already held that any claim seeking to assert such a right would be moot. That AFA no longer has the right to specific enforcement of the successorship clause, however, simply does not answer the question whether Delta is answerable in damages for Western's alleged pre-merger breach of that clause. (Delta does not dispute that, as a general rule, grievances arising before expiration of a CBA survive and continue to be governed by its terms. *See Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945). *Cf. Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 250-52 (1977) (same under NLRA)).

Assuming, as we must in this context, that Western was obliged by the successorship clause to bind any merger partner to the CBA, an arbitrator might find that Western was required to structure the merger so as to preserve itself as a separate operating entity. In that event, the arbitrator might also find that the NMB's determination to extinguish AFA's certification as representative of the former Western flight attendants was a foreseeable consequence of Western's breach, and that the carrier is liable to AFA for its

contract damages. The situation would be no different analytically if the CBA had expressly provided for a sum of liquidated damages in the event that Western breached the successorship clause. Neither of Delta's theories explains why the arbitrator could not award relief in the form of damages based upon such a breach.

Delta points out that the Ninth Circuit held that the *Teamsters* litigation was moot, 854 F.2d at 1178, even though the plaintiff unions there argued, as does AFA here, that even if their claims for injunctive and declaratory relief were moot, an arbitrator could still award damages for breach of the successorship clauses in their CBA's.

The argument was indeed made in the briefs before the Ninth Circuit, yet in its *per curiam* order dismissing the *Teamsters* actions, the court made no mention of it. Indeed, the court characterized the relief requested as merely "an order compelling Western to arbitrate and an injunction prohibiting the merger," and concluded that in light of the intervening consummation of the Delta-Western merger, "none of the relief sought in the original complaint is now available." *Id.* Were the Ninth Circuit decision binding precedent in this circuit, it might give us greater cause for concern, since its judgment necessarily, if implicitly, rejected all of the arguments that the unions made. Because the court did not explain why it rejected the unions' argument that their damage claim was live, however, its decision adds no persuasive force to the arguments already advanced by Delta in this action.

For the reasons given above, we conclude that AFA's damage claim is not "so insubstantial or so clearly foreclosed by prior decisions that th[e] case may not proceed," *Memphis Light*, 436 U.S. at 8-9, and turn to the question of the district court's subject matter jurisdiction over that claim.

[9]

III. JURISDICTION

Section 2, *Fourth* of the RLA, which establishes the right of covered employees to bargain collectively, also provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class." 45 U.S.C. § 152, *Fourth*. Section 2, *Ninth* of the Act provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees . . ., it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier.

45 U.S.C. § 152, *Ninth*. Section 2, *Ninth* further provides that upon receipt of a certification from the RLA, "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter." *Id.*

In *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943), the Supreme Court held that the NMB's power to resolve "any dispute . . . among a carrier's employees as to who are the representatives of such employees" is exclusive. *Id.* at 303. The right of a majority of the employees to choose the bargaining representative is protected by the NMB's certification power under § 2, *Ninth*, to the exclusion of any concurrent judicial protection. *Id.* at 301.

In reaching this conclusion, the Court looked to the structure and legislative history of the RLA, and there found that Congress has consistently expressed a strong preference for "conciliation, mediation, and arbitration," providing judicial remedies only in specific narrow circumstances. *Id.* at 302. Against that background, the

Court concluded that "Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." *Id.* The Court further noted that Congress intended the NMB finally to resolve "jurisdictional disputes between unions," and concluded that "if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain." *Id.* at 303.

The Court then found that a district court has no power either to review the NMB's certification of a representative, or to make such a certification itself, but that it does have the power, which the Board itself lacks, to enforce the NMB's certification:

> The Mediation Board makes no "order." And its only ultimate finding of fact is the certificate. The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree.

Id. at 304.

The Court's opinion in *Switchmen's Union* leaves open two questions central to this dispute. First, apart from a challenge by one union to the merits of the NMB's certification of another union, such as that case presented, what types of claims constitute "jurisdictional disputes" and are thus within the NMB's jurisdiction? Second, may a party laying claim to a remedy that the NMB cannot give seek relief elsewhere, either through court-ordered arbitration, or in the district court itself?

The Court suggested an answer to the second question in *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 297 (1943) (*M-K-T*), a companion case to *Switchmen's Union* involving a dispute between two unions, representing separate crafts of locomotive employees, over the correct system for handling

cross-assignments and promotions from one craft to another. Although the precise question presented in *M-K-T*, as in *Switchmen's Union*, was whether a court could hear a representation dispute between two unions, the Court strongly suggested that arbitration is available for the pursuit of a remedy unavailable from the NMB.

The Court again noted that in enacting the RLA, Congress "entrusted large segments of this field to the voluntary process of conciliation, mediation, and arbitration," while singling out only certain disputes, such as those covered by § 2, *Ninth*, for resolution by the NMB (aided by judicial enforcement of any certification so obtained). 320 U.S. at 332. The Court then concludued that a jurisdictional dispute was not properly brought into court if, although not within the jurisdiction of the NMB, it could be resolved through arbitration:

> However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken . . ., the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife.

Id. at 336-37. The Court emphasized that whatever the proper scope of the NMB's jurisdiction, "[b]eyond the mediation machinery furnished by the Board lies arbitration." *Id.* at 332.

Switchmen's Union and *M-K-T* lay down several principles relevant to the present dispute. First, the Court

made it perfectly clear in both cases that only the NMB may certify an employee representative. Second, the Court in *Switchmen's Union* suggested that the scope of the NMB's power under § 2, *Ninth*, is narrowly limited to determining the representative and issuing its certificate. Finally, the Court's analysis in *M-K-T* strongly suggests that if a dispute is not governed by § 2, *Ninth* it is not precluded, but rather may be pursued through the voluntary processes, such as arbitration, that Congress made the norm.

These principles do not resolve, but they do inform, our resolution of the precise issues before us, which are: (1) whether AFA's remaining claim raises a "dispute . . . as to who are the representatives of [Western's] employees" within the meaning of § 2, *Ninth* of the RLA; and (2) assuming this action is not technically within the NMB's jurisdiction, whether the relief sought by AFA is nonetheless precluded on the ground that the complaint raises—as Delta calls them—"representation issues."

A. *Jurisdictional disputes*

All of the courts of appeals to have considered the issue (as this court has not) have held that the question whether a union's certification survives an airline merger is a matter within the exclusive jurisdiction of the NMB. *See International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir. 1976); *Air Line Pilots Ass'n v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 23-24 (2d Cir. 1981); *International Brotherhood of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 159 (5th Cir. 1983); *Brotherhood of Ry. Clerks v. United Air Lines, Inc.*, 325 F.2d 576, 579-80 (6th Cir. 1963); *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986). The result is no different if the union frames its action as a contract dispute arising from a successorship clause in a CBA. A claim seeking

either specific performance of such a clause or a declaration that it is binding is nonjusticiable because the relief sought is, in effect, a certification within the meaning of § 2, *Ninth*; and as such, it is within the exclusive competence of the NMB. *See, e.g., Brotherhood of Ry. Clerks*, 325 F.2d at 579-80. *See also Texas Int'l Airlines*, 717 F.2d at 162 ("The form of the complaint [does] not control, for the substance of the dispute in fact involve[s] the question of representation of the employees."); *Brotherhood of Ry. Clerks*, 325 F.2d at 579 ("Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute.' ") (citation omitted).

The principle that a court lacks power to declare, even in an action framed so as to sound in contract, whether a union may continue to represent employees in the post-merger context, is supported, if not compelled, by the Supreme Court's analysis in *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943). There one of the carrier's unions sought a declaratory judgment invalidating a CBA insofar as it purported to designate another union as the representative of certain employees. The Court held that the action, though framed as a dispute over the validity of the CBA, was in substance a "jurisdictional dispute," since it "raise[d] the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer." *Id.* at 343. Seeing "no reason for differentiating this jurisdictional dispute from [those involved in *Switchmen's Union* and *M-K-T*]," the Court held that it fell within the exclusive jurisdiction of the NMB. *Id.* at 343-44.

Application of the *Southern Pacific* principle to an action seeking either injunctive or declaratory relief with respect to the successorship clause of a CBA clearly advances the policies underlying the RLA, as implemented

by the NMB. Congress entrusted the NMB with exclusive power to resolve representation disputes between unions because of the inherent divisiveness of such disputes and the strong interest of the parties in nonetheless "get[ting] the matter settled." *Switchmen's Union*, 320 U.S. at 303.

The NMB has in turn adopted the rule that when two or more airlines merge their operations, the certificate of any union representing only a minority of the relevant employees of the merged carrier is extinguished, to be replaced by whatever new certificate the NMB may grant with respect to representation of the employees of the merged entity as a whole. *Republic Airlines, Inc. and Hughes Air Corp.*, 8 N.M.B. 49, 54-55 (1980). As Judge Rubin of the Court of Appeals for the Fifth Circuit explained in the context of a merger between a unionized airline and a non-union airline, post-merger judicial enforcement of any provision of a pre-merger CBA would undermine the NMB's rule, because it would necessarily entail the union's continued representation of its former constituents, regardless of whether they constitute a majority of their class in the merged enterprise; as a result, some employees could be represented while others in the same class would not be. *Texas Int'l Airlines*, 717 F.2d at 163. For a court even to "grant injunctive relief maintaining the staus quo if the underlying dispute is representational in nature" would be problematic, the court observed, "because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representational issue." *Id.* at 161. The court therefore inferred "a congressional intent to allow [the NMB] alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.* at 164.

Relying on the cases canvassed above, Delta argues that AFA's claim raises a representation dispute under § 2, *Ninth*, and that as a result "[a]ny order of this Court

or any award of an arbitrator in AFA's favor in this dispute inevitably would invade the NMB's exclusive jurisdiction over representation issues and exceed the Court's or the arbitrator's jurisdiction." Delta's conclusion is not compelled by the cited cases, however, since in each one (with a single exception discussed more fully below), the union sought not damages, but rather a declaration or an injunction that would have given it an ongoing right of representation—truly the functional equivalent of the certificate that the NMB alone can issue. The courts found, quite sensibly, that these nominal contract claims were *de facto* claims to judicial certification of the plaintiff union's representative status. To entertain such a case would not only violate the spirit of the Supreme Court's teaching, it could also create a situation where, contrary to NMB policy, employees working side by side would be represented by different unions (or some would be represented and others not) and subject to diverse terms of employment.

An award of damages for a past breach of contract, on the other hand, would not have those untoward results. First, the NMB's policy of revoking a minority union's certificate as of the date of an operational merger would not be affected if it were later determined that the carrier, by agreeing to the terms of the merger, had breached its CBA. The merger would not be undone; the old CBA would not be reinstated; all employees in any one craft would still be subject to uniform terms of employment. Second, an award of damages would have no effect on the NMB's certification determination. The plaintiff union's pre-merger status as representative would not be revived, nor could any factual finding by an arbitrator in a damage action for breach of the CBA either overturn or predetermine the NMB's decision certifying a post-merger representation. Finally, a damage award, unlike prospective relief, would not cause any confusion as to which union is the proper post-merger representative.

The NMB would make that determination as usual; the employees would continue to be represented by the sole representative it has certified; and any failure on the part of the employer to "treat with" the certified representative would be remediable in federal court, regardless of any determination that the arbitrator might make in the course of deciding the damage case.

Delta points, however, to Justice O'Connor's opinion staying the injunction in the *Teamsters* litigation, and notes that although there was a damage issue in that case, Justice O'Connor nonetheless looked to the "great weight of the case law" holding that "disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board." 480 U.S. at 1305. Delta would have us read Justice O'Connor's opinion as standing for the unqualified proposition that (in the carrier's words) all "disputes over labor contract successorship clauses are within [the] NMB's jurisdiction."

We do not read Justice O'Connor's opinion so broadly, however. The only issue before the Justice was the propriety of the Ninth Circuit's order enjoining the merger pending the outcome of arbitration. In that posture, the case warranted her expedited attention only because of the disruptive effect of the injunction; her opinion focuses accordingly on the nature and consequences of the emergency relief that the unions sought. For example, the opinion notes, quoting Judge Rubin in *Texas Int'l Airlines*, 717 F.2d at 161, 164, that even a status quo injunction "would necessarily have the effect, at least during the period of the injunction, of deciding the representational issue," and that Congress intended the NMB "alone to consider the post-merger problems that arise from existing collective bargaining agreements." 480 U.S. at 1306. Although the opinion comments favorably upon the decision of the district court in the case now before us, that

decision had given no hint of a damage claim lurking behind the injunction then of immediate concern, and Justice O'Connor's opinion therefore understandably describes AFA's complaint only as one "seeking an order compelling Western to submit to arbitration . . . and enjoining the merger pending completion of [arbitral] proceedings." *Id.* at 1306-07. It is thus plain enough that Justice O'Connor was addressing only the issue directly before her, and had no occasion to consider, much less to rule upon, the question whether a claim for damages might survive a merger after her order staying the injunction.

As this case currently stands, it simply does not raise the concerns set forth in Justice O'Connor's opinion. AFA's claims for injunctive relief are now moot, and no resolution of the remaining damage claim could have any effect upon either the Delta-Western merger or the representation of Delta's employees. This dispute is over a sum of money: Delta has it, and AFA wants it; no other person, and no transaction, is affected by which of them ends up with it.

We do not see here a jurisdictional dispute within § 2, *Ninth* of the RLA. Neither the certification (or decertification) of a representative, nor the functional equivalent thereof, nor anything even remotely akin thereto, is at stake. Thus, we turn to the only other issue that Delta seeks to interpose between AFA and its demand to arbitrate its damage claim, *viz.*, whether, even in the absence of a jurisdictional dispute, § 2, *Ninth* by implication bars arbitration of any dispute that raises a "representation issue." We now turn to that question.

B. *Representation issues*

Delta's argument proceeds from the premise that "[w]hen a representation issue is shown to exist in the course of other legal proceedings, the court immediately must dismiss the legal action and require the parties to

proceed, if at all, before the NMB." From that Delta reasons that because AFA's complaint raises "issues" of representation, neither the district court nor an arbitrator may hear it; even if it does not raise a true "jurisdictional dispute," that is, "Dismissal is required even if the union's complaint arguably raises issues of contract interpretation intertwined with the representation dispute." As we understand this argument, it encompasses two alternative legal theories. The first is that any case raising an "issue" of representation, no matter what form of relief it seeks, can be resolved only by the NMB. The second is that, if the NMB lacks jurisdiction to entertain a claim in which a representation issue is raised, then there is simply no remedy available because the RLA bars any other tribunal from deciding the representational issue.

Delta's first theory is premised, as an initial matter, upon AFA's complaint raising an issue of representation. According to Delta: (1) For AFA to prevail on its claim for damages, the arbitrator would have to find that the successorship clause conferred some right upon AFA, and that (2) had that right been honored, AFA would still be representing the Western flight attendants. Thus, (3) the arbitrator, in order to uphold AFA's claim, would have to resolve an issue of representation—which, as we have seen, Delta claims may be decided only by the NMB.

Assuming *arguendo* that AFA's claim, although not a jurisdictional dispute, raises an issue of representation, we do not find Delta's argument persuasive. First, Delta does not maintain that NMB, under § 2, *Ninth*, can award damages for breach of a CBA or otherwise; as the Supreme Court made clear in *Switchmen's Union*, the powers granted to the NMB under that section are quite narrow. 320 U.S. at 304. In effect, then, Delta urges upon us, or so it seems, the anomalous result that the NMB has exclusive jurisdiction over a claim as to which it has no power to grant a remedy.

Second, we question whether (at least in the absence of a clear statutory allocation of competence) any adjudicatory tribunal can have exclusive jurisdiction over an issue, as opposed to a type of claim or a remedy. Virtually any issue may arise in a variety of different contexts. As a general rule, whether a case is within the exclusive jurisdiction of an expert tribunal depends upon the nature not of the issues that may have to be decided, but of the substantive cause of action. *See Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 108 S. Ct. 830, 832-33 (1988) (notwithstanding NLRB's exclusive jurisdiction over labor law matters, "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies") (quoting *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975)); *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 662-66 (1961) (FPC's exclusive jurisdiction does not extend to state contract action seeking recovery of overcharges merely because the action calls for a determination of the validity of rates under the Natural Gas Act); *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 290-91 (1921) (notwithstanding ICC's exclusive jurisdiction to determine rates, "the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission."). *Cf. Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255, 259 (1897) ("Section 711 [conferring on the federal courts exclusive jurisdiction over patent disputes] does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *'cases'* arising under those laws.") (emphases in original).

To illustrate, suppose that a newspaper published an article stating that AFA, as the certified representative

of Western's employees, had by racial discrimination violated its duty of fair representation, even though the publisher knew that in reality, AFA did not represent any Western employees. In the ensuing libel action, the issue would necessarily arise—since AFA would have to show that the published statements were false—whether AFA was or was not the employees' representative. Under Delta's first theory, the presence of the "representation issue" would mean that the NMB would have to hear the suit. In addition to being inconsistent with the limited role Congress envisioned for that tribunal, *Switchmen's Union*, 320 U.S. at 304, the result is obviously absurd. To the extent Delta suggests that every case that merely entails an issue of representation must be brought before the NMB, then, that argument plainly proves too much.

In support of its argument, Delta points to the Second Circuit's decision in *Air Line Pilots*, the only case we have found in which a court specifically noted a union's claim for damages, 656 F.2d at 17, yet required dismissal of the action on the authority of *Switchmen's Union*. The case is not on point, however, because the union there was seeking a *judicial* award of damages, not an order compelling *arbitral* resolution of its money claim. As we read *Air Line Pilots*, the court did not hold, as Delta suggests, that there is a "jurisdictional dispute" within the exclusive province of the NMB wherever an "issue" of representation appears; rather, the court merely held that to the extent a damage action for breach of a CBA may fall outside the jurisdiction of the NMB, the general principle of judicial noninterference in labor disputes bars the court from itself entertaining the claim.

We may assume that Congress could grant a tribunal exclusive authority to pass upon a particular issue of federal law (though Delta has pointed to no instance in which it has done so); still, we find no evidence that Congress intended to do that here. In support of its theory, Delta does cite to statements in several cases

where the courts, faced with that clearly were jurisdictional disputes within the scope of § 2, *Ninth*, described the scope of the NMB's exclusive jurisdiction somewhat expansively, that is, without distinguishing between "jurisdictional disputes" and "representation issues." *See, e.g., Texas Int'l Airlines*, 717 F.2d at 161, 162. We reiterate, however, that the relief sought in those cases was either the functional equivalent of certification by the NMB, *see id.* at 158 (union's complaint would require the court to "determin[e] who represents the hitherto covered employees after the merger"), or a judicial award of damages that appeared to be inconsistent with the background of "conciliation, mediation, and arbitration" emphasized by the Court in *M-K-T*, 320 U.S. at 332, *see Air Line Pilots Ass'n*, 656 F.2d at 17, and with the "narrow role of the courts in enforcing the RLA," *id* at 24. In the absence of some specific indication that the legislature intended that all issues arguably related to representation must be decided by the NMB, we cannot conclude that Congress vested in a body with such limited powers exclusive jurisdiction over a potentially broad range of disputes that may only tangentially raise issues within its competence.

We turn then to Delta's second theory, that even if the NMB cannot entertain a particular claim for relief in which a representation issue has arisen, the presence of that issue precludes any other authority from passing upon it, with the result that no remedy is available anywhere. Under this theory, the statutory provision for certification exclusively by the NMB has a preclusive effect, and any clause in a CBA, such as a successorship clause, the interpretation of which would require an arbitrator to make a finding on a representation issue, would simply be unenforceable and of no effect.

Due respect for privately bargained outcomes cautions against that result, unless some important public policy

would otherwise be compromised. Delta has pointed us only to the policies underlying Congress's delegation to the NMB of exclusive jurisdiction to determine who will represent employees in a post-merger setting. Although those policies do support the rule that a successorship clause cannot be specifically enforced, they simply do not require that an award of damages for breach of such a clause be barred. The most that can be said in support of Delta's position is that if a carrier were liable in damages for breach of the successorship clause in its CBA, it might forego entering into an otherwise desirable merger.

Delta has pointed us to nothing in the language, the legislative history, or even the spirt of the RLA to suggest that Congress, in vesting the NMB with exclusive jurisdiction over jurisdictional disputes, intended to remove barriers to economically efficient merger activity on the part of airline carriers. *Cf.* 49 U.S.C. § 11341(a) (exempting railroad mergers from, *inter alia*, the antitrust laws). In the absence of such an indication, we decline to hold, in the context of the threshold jurisdictional issue now before us, that a bargained-for successorship clause creates no legal rights or duties whatsoever. Whether the successorship clause in this case creates any legal obligations is, of course, a matter within the province of the arbitrator.

IV. Conclusion

This damage action is not a jurisdictional dispute within the NMB's exclusive jurisdiction under § 2, *Ninth*, of the RLA. At most, it may raise what Delta calls a "representation issue." In light of the Supreme Court's emphasis in *M-K-T* on the background availability of arbitration for disputes not within the purview of § 2, *Ninth*, however, we do not think it is non-arbitrable merely because that issue arises, because its resolution in arbitration would not interfere, as a practical matter,

with the NMB's certification function. We therefore conclude that § 2, *Ninth* of the RLA does not divest the district court of jurisdiction to order arbitration of AFA's claim for damages.

For all the foregoing reasons, the order of the district court dismissing the action is reversed, and the action is remanded for further proceedings.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987
CA 87-00040

No. 87-7040

Association of Flight Attendants, AFL-CIO,
Appellant

v.

Western Airlines, Inc.

BEFORE: Silberman, D.H. Ginsburg, and Sentelle, Circuit Judges

Upon consideration of Defendant/Appellee's Motion to Dismiss for Mootness and Appellant's opposition thereto, it is

ORDERED by the court that Defendant/Appellee's Motion to Dismiss for Mootness be denied. Although Appellant's claim based on any right of continued representation is moot, it is not clear whether an arbitrator could award damages for breach of the collective bargaining agreement. It is

FURTHER ORDERED that the parties limit their briefs to the issue of whether an arbitrator could award damages to Appellant if the arbitrator finds that Appellee breached the collective bargaining agreement.

United States Court of Appeals
For the District of Columbia Circuit
FILED JUN 06 1988
CONSTANCE L. DUPRÉ
CLERK

Per Curiam

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 87-7040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Appellant,

v.

WESTERN AIRLINES, INC.

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

FILED MAR 31 1987

ORDER

Upon consideration of Appellant's Emergency Motion for Injunction To Compel Arbitration Pending Appeal and the Opposition and Response thereto and of Appellee's Emergency Motion For Expedited Appeal And Decision Before April 1, 1987, it is

ORDERED by the court that Appellant's motion to compel arbitration be denied. It is

FURTHER ORDERED by the court that Appellee's motion to expedite be denied.

APPENDIX D

[1] ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Plaintiff,

v.

WESTERN AIRLINES, INC.,

Defendant.

Civ. A. No. 87-0040.

United States District Court,
District of Columbia.

Feb. 20, 1987.

* * *

Deborah Greenfield, Stephen Crable, for plaintiff.

William J. Kilberg, Baruch A. Fellner, Washington, D.C., Scott A. Kruse, Los Angeles, Cal., for defendant.

MEMORANDUM

GESELL, District Judge.

This is a labor dispute which has arisen under the Railway Labor Act, 45 U.S.C. §151 to 188 (1982) ("RLA"). It comes before the Court on plaintiff union's ("AFA") verified complaint and dispositive cross-motions. Defendant Western Air Lines, Inc. is scheduled to merge with Delta Air Lines, Inc. on April 1, 1987. Western's employees are represented by several different unions according to craft, including AFA. Delta is a non-union carrier. AFA claims that Western has breached its 1984 collective bargaining agreement with AFA by failing to bind Delta to the terms of that agreement.

Facts

There are no material facts in dispute.

(1) On September 9, 1986, Western and Delta entered into an Agreement and Plan of Merger.

(2) On October 21, 1986, AFA filed a grievance over Western's failure to bind Delta to the 1984 collective bargaining agreement.

(3) On November 19, 1986, Western denied the grievance.

(4) On November 26, 1986, AFA submitted the dispute to Western's System Board of Adjustment pursuant to Section 24 of the collective bargaining agreement, and Western refused to arbitrate. Section 24(D), established under 45 U.S.C. § 184 of the RLA, provides for jurisdiction in the System Board over disputes "growing out of grievances or out of interpretation of application of any of the terms of the" collective bargaining agreement but "shall not extend to change in hours of employment, rates of compensation or working conditions. . . ."

(5) On December 11, 1986, the U.S. Department of Transportation gave final approval to the Agreement and Plan of Merger under the Federal Aviation Act.

(6) On December 18, 1986, as the first step looking toward merger, Delta acquired [2] 100% control of Western and became its parent.

(7) On January 8, 1987, AFA filed its complaint with this Court. Western's motion to transfer the case to the U.S. District Court for the Middle District of California[1] was denied on January 20, 1987, and the motions now before the Court were promptly filed and opposed.

(8) In Section 5.9 of the Agreement and Plan of Merger, Delta and Western agreed that Western would continue to honor its 1984 collective bargaining agreement with

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[1] Unions certified as representing Western employees engaged in other crafts are raising comparable issues there.

AFA while it was a separate company under Delta's control. This has been done and there is no claim to the contrary. No layoffs are contemplated, either before or after the merger. If Western merges as planned into Delta on April 1, 1987, all Western flight attendants presently represented by AFA will become employees of Delta, supplementing and combining with Delta's much larger complement of flight attendants. Significantly higher wages and benefits will be paid flight attendants now represented by AFA when they are Delta employees but, of course, they will be subject to Delta's own procedures, policies and rules governing flight attendants.[2]

(9) AFA's 1984 collective bargaining agreement with Western stated in Section 1(C):

This Agreement shall be binding on any successor or *merged Company* or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) *until changed in accordance with the provisions of the Railway Labor Act, as amended.* (Emphasis added.)

The Contentions of the Parties

If the merger occurs on April 1, 1987, AFA's certification as the bargaining representative for flight attendants formerly employed by Western who become Delta employees will automatically be extinguished pursuant to the National Mediation Board's established policy.[3]

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[2] In addition, Delta has voluntarily provided significant labor protective commitments to the Western flight attendants.

[3] Where two airlines are merged to form a single transportation system the National Mediation Board, to promote stable labor relations and remove problems of uneven representation, redundancy and confusion, considers the certification of all unions representing the employees of the acquired airline as extinguished on the date of integration. *See* Northwest Airlines, Inc., 13 N.M.B. 399, 400-01 (1986); Republic Airlines, Inc., 8 N.M.B. 49, 54-56 (1980). *See also Air Line Employees Assoc., Int'l v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 n. 4 (7th

Characterizing the controversy as simply a "minor" dispute involving the proper interpretation of Section 1(C)[4] and therefore appropriate for resolution by Western's System Board of Adjustment, AFA contends that Section 1(C) does not allow its collective bargaining agreement to be extinguished, but rather requires Western "to bind any successor or parent to that Agreement,"[5] by providing as a condition to merger that after the merger takes place Delta accept and be bound by the terms of AFA's 1984 collectively bargained agreement with Western.[6] AFA seeks an order from this Court directing Western to submit the issue to the System Board of Adjustment and asks the Court thereafter to retain jurisdiction to enforce compliance with any award the System Board makes against Western. If a prompt award is not made the Court is further requested to preserve the status quo by preventing the merger pending completion of proceedings before the System Board.

Western contends that the 1984 collective bargaining agreement is subject to change in accordance with requirements of the RLA as paragraph 1(C) states, noting that by operation of the RLA AFA's certifica- [3] tion as the bargaining representative of Western employees must dissolve with the merger. It also contends that a fundamental question of post-merger representation is presented, and that since issues of representation are current and directly involved the System Board lacks jurisdiction under the RLA and the issues fall under the exclusive jurisdiction of the National Mediation Board.

Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct 458, 93 L.Ed.2d 404 (1986); *International Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir.1983).

[4] *See Elgin, J. & E. Ry. v. Burley*, 325 U.S. 711, 723-25, 65 S.Ct. 1282, 1289-1290, 89 L.Ed. 1886 (1945).

[5] Complaint, ¶ 17.

[6] Complaint, ¶ 18.

Discussion

The situation presented by these conflicting positions is not one of first impression. Other federal courts have confronted similar labor disputes and their consistent recognition of the primary role of the National Mediation Board in resolving questions of representation has governed. Pursuant to the RLA, 45 U.S.C. §§ 155, 181 and 183, Congress has clearly relegated all cases involving the representation of airline employees for collective bargaining purposes to the exclusive jurisdiction of the National Mediation Board. *See General Committee of Adjustment v. Missouri-K.-T. Ry.*, 320 U.S. 323, 335-38, 64 S.Ct. 146, 151-53, 88 L.Ed. 76 (1943); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303-07, 64 S.Ct. 95, 98-100, 88 L.Ed. 61 (1943); *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 161-62 (5th Cir.1983); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 22-24 (2d Cir.1981). *See also* 9 T. Kheel, *Labor Law* § 50.07[2] (1986).

Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA.[7] This is particularly true in merger situations where representational issues inevitably arise and it is "impossible to look only to the existence of a collective

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[7] *See International Bhd. of Teamsters, supra*, 717 F.2d at 164 ("Given the [National] Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements").

bargaining agreement and to isolate it from the other operational and representational matters." *International Brotherhood of Teamsters, supra*, 717 F.2d at 163. Thus, in cases presenting union challenges to airline mergers, "[w]here a representation dispute appears on the face of the complaint . . . the court is bound to dismiss the action." *Air Line Pilots Association, International, supra* 656 F.2d at 24 (citing *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir.1963) (Friendly, J.), *cert. denied*, 376 U.S. 913, 84 S.Ct. 658, 11 L.Ed.2d 611 (1964)).

There can be no question that the issue of post-merger representation is presented by this dispute. AFA itself recognized in its memorandum in support of summary judgment that a System Board arbitrator might bind Delta to the 1984 agreement "if it wants to proceed with an operational merger," or might otherwise take action that would require Delta, a non-party to the 1984 agreement, to set Western's flight attendants apart from Delta's flight attendants regardless of operational requirements.[8]

For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA. *See, e.g., Air Line Employees Association, International v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir.1986) (per curiam), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458, 93 L.Ed.2d 404 (1986); *International Brotherhood of Teamsters, supra*, 717 F.2d at 160-61; *Air Line Pilots Asso-* [4] *ciation, International, supra*, 656 F.2d at 23-24.

Conclusion

AFA is entitled to no relief from this Court, and its motion for summary judgment is denied. Western is

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[8] Plaintiff's Memorandum at 25.

granted summary judgment and the complaint is dismissed with prejudice. An appropriate Order is filed herewith.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-7921 JMI (Px)

FILED
FEB 13 1987

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Plaintiffs,

v.

WESTERN AIR LINES, INC., *et al.*,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, and the file in the case, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

2. Defendants' Motion to Dismiss for lack of jurisdiction is GRANTED without prejudice.

It is the duty of the National Mediation Board (hereinafter "NMB") to investigate all disputes regarding em-

ployee representatives. 29 C.F.R. § 1203.2. In the present case, the dispute is between the carrier (Western) and the union (the employee representative). The Supreme Court has held that the jurisdiction of the NMB over representation disputes under the Act is exclusive and the decisions of the NMB are representation matters and not subject to judicial review. *Switchman's Union v. National Mediation Board*, 320 U.S. 297, 64 S.Ct. 95, 98-100 (1943); *General Committee v. Missouri-Kansas-Texas Railroad*, 320 U.S. 323 (1943). Federal Courts may not intervene in a representation dispute but must disclaim jurisdiction and leave to the NMB, the protection of the conditions necessary to insure employee free choice. *Texador v. Suressa*, 590 F.2d 357 (1st Cir. 1978); *Aircraft Fraternal Association v. United Airlines, Inc.*, 406 F. Supp. 492 (N.D. Cal. 1976).

In the following cases, the Court dismissed the action since a representation issue was raised which was within the exclusive jurisdiction of the NMB. In *Airline Employees Associations v. Republic Airlines, Inc.*, 798 F.2d 967, 968 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3358 (November 18, 1986), the Court held that the union's action for expedited arbitration of a grievance and an injunction pending arbitration in a merger case raised representation issues. Similarly, in *Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983), the Court held that an action by a union seeking a declaration that its contract survived a merger raised an issue of representation.

Similarly, in the present case the union's action for an injunction and arbitration of a grievance in a merger, raises a representation issue. Therefore, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.

DATED: 13 FEB 87

JAMES M. IDEMAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-8032 JMI (Bx)

FILED
FEB 13 1987

AIR TRANSPORT EMPLOYEES,

Plaintiffs,

v.

WESTERN AIR LINES, INC.,

Defendants.

ORDER DISMISSING THE ACTION FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the file in the case, IT IS HEREBY ORDERED as follows:

1. The Court *sua sponte* dismisses the instant action for lack of subject matter jurisdiction, without prejudice. The Court finds that the present action raises a representation issue, which is within the exclusive jurisdiction of National Mediation Board (hereinafter "NMB").

2. On January 21, 1987, the Court issued an Order to Show Cause Re Dismissal, whereby the parties were instructed to respond to the Court's Order on or before January 28, 1987. However, the parties have failed to show cause as to why the action should not be dismissed. Accordingly, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.
DATED: 31 Feb 87

JAMES M. IDEMAN
United States District Judge

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,

Applicants,

v.

IBTCWHA, LOCAL UNION NO. 2702, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same is hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 1st
day of April, 1987

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,
Applicants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND AIR TRANSPORT EMPLOYEES

AMENDED ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction and order compelling arbitration before the Systems Boards issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same are hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 2nd
day of April, 1987.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.

ON APPLICATION FOR STAY

Decided April 2, 1987

[1302]

JUSTICE O'CONNOR, Circuit Justice.

Applicants request that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The underlying dispute in this case involves the division of responsibility for regulation of collective bargaining between airlines and their employees under the Railway Labor Act, 44 Stat. 577, 45 U.S.C. §151 *et seq.* The Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. §184. While courts lack authority to interpret the terms of a collective-bargaining agreement, a court may compel arbitration of a minor dispute before the authorized System Board.

"Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by §6 of the Act, 45 U.S.C. §§156, 181.

"Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under §2, Ninth of the Act, the National [1303] Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §152, 181.

Applicants, Western Airlines and Delta Air Lines, entered into an agreement and plan of merger on September 9, 1986. The merger agreement was approved by the United States Department of Transportation on December 11, 1986. On December 16, 1986, shareholder approval of the merger was conferred and Western Airlines became a wholly-owned subsidiary of Delta. On the morning of April 1, 1987, the merger of Western Airlines with Delta was scheduled to be completed. *See infra*, at 1308.

Respondents represented various crafts or classes of employees of Western Airlines. The Air Transport Employees (ATE) was designated by the National Mediation Board as the bargaining representative for a unit of Western employees consisting of clerical, office, fleet and passenger service employees. The International Brotherhood of Teamsters Local 2707 was the certified representative of three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. Each union's collective-bargaining agreement has a provision stating that the agreement shall be binding upon successors of the company.

Delta has substantially more employees than Western in the crafts or classes represented by the unions, and these Delta employees had no bargaining representative. Respondents filed grievances alleging that Western violated the successorship provisions of the two collective-bargaining agreements by failing to secure Delta's agreement to be bound by the collective-bargaining agreements between Western and respondent unions. Western refused to arbitrate the grievances, asserting that they necessarily

involved representation issues and therefore were within the exclusive jurisdiction of the National Mediation Board.

The unions filed separate complaints in the District Court for the Central District of California, each requesting the [1304] District Court to treat the successor clause dispute as a minor dispute, and compel arbitration of the dispute by the System Adjustment Board. Both complaints were dismissed for lack of subject matter jurisdiction.

On March 17, 1987, the Court of Appeals for the Ninth Circuit entered an interim order directing arbitration of the grievances to proceed before the unions' respective System Adjustment Boards pending appeal.

At approximately 8:00 p.m. Eastern Time, March 31—little more than 12 hours before the merger was scheduled to take place—the Court of Appeals for the Ninth Circuit issued the following order:

> "1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.
>
> "2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.
>
> "3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by the court, the injunction of the merger shall terminate.
>
> It is so ordered. A written opinion will be filed as soon as practicable." Application Exh. 4.

The timing and substance of the Court of Appeal's order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile. I conclude that this situation presents one of those rare extraordinary circumstances in which request for [1305] a stay before the Court of Appeals is not required under the Rule.

I also conclude that the judgment of the Court of Appeals, reversing the district court decisions, requiring the entry of orders compelling arbitration, and enjoining the merger, is final within the meaning of 28 U.S.C. §2101(f). The Court of Appeal's provision for lifting the injunction upon certain stipulations of applicants does not divest the judgment of finality when, as in this case, the required stipulations, to have any significance, must bind applicants to a concession of their position on the only question before the Court of Appeals: whether the successor clause dispute is within the jurisdiction of the System Adjustment Board or the National Mediation Board.

Moreover, regardless of the finality of the judgment below, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301 (1976) (REHNQUIST, J., in chambers).

The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the case law supports the proposition that disputes as to the effect of collective-

bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board. In *International Brotherhood of Teamsters* v. *Texas International Airlines, Inc.*, 717 F. 2d 157 (CA5 1983), the Court of Appeals for the Fifth Circuit held that "[t]he [Railway Labor] Act commits disputes involving a determination of who is to represent airline employ- [1306] ees in collective bargaining to the exclusive jurisdiction of the National Mediation Board." The Fifth Circuit stated, "A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. Moreover, a court may not grant injunctive relief maintaining the status quo if the underlying dispute is representational in nature, because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representation issue." *Id.*, at 161. "Given the Mediation Board's undeniable sole jurisdiction over representation matters," and the practical problems of divided jurisdiction among the other dispute-resolution fora, the Fifth Circuit inferred "a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.*, at 164. The Court of Appeals for the Seventh Circuit treated the question of National Mediation Board jurisdiction over alleged collective bargaining violations implicating post-merger representation as one settled by "the overwhelming and well-developed case law," and found "no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits." *Air Line Employees* v. *Republic Airlines, Inc.*, 798 F.2d 967, 968 (quoting Order No. 86C5239 (N.D. Ill. July 28, 1986)), cert. denied, 479 U.S. 962 (1986). See also *Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines*, 656 F. 2d 16 (CA2 1981); *International Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F. 2d 975, 977 (CA1), cert. denied, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks* v. *United Air*

Lines, Inc., 325 F. 2d 576 (CA6 1963), cert. dismissed, 379 U.S. 26 (1964). It was upon this overwhelming body of case law that the District Court for the District of Columbia relied when it considered the complaint of the Association of Flight Attendants (AFA), also arising from the Western-Delta merger. AFA's complaint, seeking an order compelling Western to submit to arbitration by the System Board of Adjustment and enjoining [1307] the merger pending completion of proceedings before the System Board, was dismissed. *Association of Flight Attendants, AFL-CIO* v. *Western Airlines, Inc.*, No. 87-0040 (D DC February 20, 1987). On March 31, 1987 the Court of Appeals for the District of Columbia Circuit denied AFA's motions to compel arbitration pending appeal, and its motion for expedited appeal and decision before April 1. *Association of Flight Attendants, AFL-CIO* v. *Western Airlines, Inc.*, No. 87-7040. The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

To appreciate the balance of the equities created by the Ninth Circuit's order, one must focus on the stipulation clause of that order. What was to be gained or lost by the applicants and respondents in this case was not the merger of Western and Delta Airlines alone but the substance of the stipulation on which that merger was conditioned by the Ninth Circuit.

The stipulation which the Ninth Circuit required from Western and Delta Airlines is subject to two interpretations. The first is a requirement that Delta and Western agree that if, after full judicial review of the *jurisdictional* as well as other issues raised, it is determined that the claims presented by the respondents fall under the jurisdiction of the System Adjustment Board, the successor corporation will be bound by the result of the completed arbitration process. Under this interpretation of the stip-

ulation, the successor corporation was required to do no more than adhere to the obligations placed upon it by law, as those obligations are determined in the litigation. Those legal obligations, of course, would exist independent of any stipulation. If the stipulation would leave the applicants free to assert any of their arguments against the jurisdiction of the System Adjustment Boards, the applicants would have remained in the [1308] same position after the stipulation as they were before, and the stipulation would have served no purpose.

The other interpretation of the clause is that, in order to avoid an eleventh hour injunction of the merger, Delta and Western were required to stipulate as to the correctness of respondents' argument that this dispute *did* in fact fall under the jurisdiction of the Systems Adjustment Board. As to the balance of equities on this interpretation of the Ninth Circuit's order, they clearly weigh in favor of the applicants. The potential harm that would be suffered by applicants as a result of the Court of Appeals' injunction of their merger is seriously aggravated by the fact that the order issued on the very eve of the merger's consummation. For several months, applicants have been planning to combine their large-scale, complex, inter-related and heavily regulated operations effective April 1, 1987. That planning included the transfer, modification and cancellation of hundreds of Western's contracts for supplies and services and equipment leases. The approval of the Federal Aviation Administration of changes in Western's operating certificates, specifications and training programs have been sought and received. Maintenance schedules, flight schedules and staffing schedules have been modified in order to effect a smooth transition to a merged operation on April 1. Large numbers of Western management personnel, without whom it cannot operate as an independent entity, are to be severed effective April 1; many have presumably arranged for new employment. Delta has negotiated for transfer of Western's Mexican

and Canadian routes with the respective governments of those countries. It is doubtful that these arrangements can be undone if the merger does not take place as anticipated.

Because of the operational adjustments that are already in place, the FAA has expressed doubt whether Western will be permitted to continue operations should the merger not take place, potentially stranding thousands of travelers. [1309] Employees, expecting to be transferred to new locations after April 1, have sold old homes and bought or leased new ones. Changes in pay, working conditions, and conditions of employment all have been planned for and relied upon in anticipation of the merger. Millions of dollars of advertising have been targeted toward the April 1, 1987 merger date. And the list of consequences goes on. See Emergency Application for Stay and Vacation of Injunction, Affidavit of Hollis Harris and Exhibit 1 thereof; Affidavit of Robert Oppenlander; Affidavit of Russell H. Heil; Affidavit of Whitley Hawkins; Affidavit of C. Julian May; Affidavit of Jason R. Archambeau. The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality. Under the second interpretation of the stipulation clause—the only interpretation under which the required stipulations would have had meaning—applicants could prevent these losses only by conceding their argument, supported by the great weight of authority, that their dispute with respondents fell under the jurisdiction of the National Mediation Board. On the other side, respondents had no entitlement to such a concession, obtained under these circumstances, from parties that had otherwise indicated their intent to continue to assert the contrary position on the jurisdictional issue. Before the Court of Appeals the unions argued that completion of the merger would moot their claims under

the collective-bargaining agreement to System Board arbitration. For the reasons stated above, I doubt that respondents' claims would ultimately prevail. Moreover, preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, rather than by the inequitable last-minute foisting of a Hobson's choice on applicants. Finally, the employees themselves are protected by Delta's assumption of the Allegheny-Mohawk Labor Protec- [1310] tive Provisions, requiring the continuation of certain fringe benefits, displacement and dismissal allowances for up to four to five years for employees who lose their jobs or get lesser-paying jobs, moving and related costs for employees required to move, integration of seniority lists and binding arbitration of any dispute relating to the labor protective provisions. See *Allegheny-Mohawk Merger Case*, 59 C. A. B. 22 (1972); Heil Affidavit, ¶6.

Because the stipulation upon which the lifting of the injunction was conditioned appears to be either unnecessary or extremely inequitable, depending upon its interpretation, and because it appears to me likely that at least four Justices would vote to grant certiorari and that the applicants are likely to prevail on the merits, I grant the requested stay of the Court of Appeals for the Ninth Circuit's injunction and order compelling arbitration before the System Boards, pending the timely filing and subsequent disposition of a writ of certiorari in this case.

APPENDIX I

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

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14 NMB No. 86
FILE NO. C-5955

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[291] In the matter of
the merger of

DELTA AIR LINES, INC.

and

WESTERN AIR LINES, INC.

TERMINATION OF
CERTIFICATIONS
(WESTERN AIR LINES)

July 9, 1987

On April 20, 1987, the National Mediation Board (Board) received a request from Delta Air Lines, Inc. (Delta) invoking the Board's services "to determine whether the Board's certifications of the Western labor organizations as collective bargaining representatives of the various crafts or classes at Western have been extinguished or terminated effective April 1, 1987." Delta's request was made in accordance with *Trans World Airlines/Ozark Air Lines*, 14 NMB 218 (1987).

Review of the Board's records reveals that several labor organizations were certified to represent various crafts or classes at Western Air Lines, Inc. (Western). In R-4995,

the Air Transport Employees was certified to represent the craft or class of Office, Clerical, Fleet & Passenger Service Employees. The Association of Flight Attendants was certified to represent the craft or class of Flight Attendants in R-3665. The International Brotherhood of Teamsters was certified to represent the crafts or classes of Instructors (R-4785), Mechanics and Related Employees (R-3951) and Stock Clerks (R-3788). The Air Line Pilots Association represents the craft or class of Pilots pursuant to voluntary recognition.

On Delta the Pilots are represented by ALPA.The craft or class of Dispatchers is represented by the Professional Airline Flight Control Association pursuant to certification in R-4254.

[292] The Board, on April 23, 1987, directed Delta and Western to furnish certain information on the present operations of the airlines. Delta and the involved labor organizations submitted responses. Pursuant to the Board's request Delta submitted additional information on May 21, 1987, as well as June 16 and 22, 1987.

ISSUES

The following issues are before the Board:

1) Whether Delta and Western combined to form a single transportation system, for purposes of the Railway Labor Act, on April 1, 1987 and;

2) If a single transportation system was created, what affect if any does this have on the representation certifications of the organizations at Western and when did the affect occur?

PENDING LITIGATION

An issue arose from grievance actions filed by ATE, IBT and AFA prior to April 1, 1987. In those actions the

unions sought to compel arbitration of grievances under their labor agreements with Western, alleging breach of successorship clauses in connection with the then-proposed merger of Western into Delta. The unions alleged that Western violated those clauses by failing to secure Delta's agreement to be bound by the unions' contracts after the merger was completed. Western refused to submit to arbitration contending that it might result in a decision on representation of Delta employees after the merger. Representation matters, Delta asserted, are within the exclusive jurisdiction of the Board.

The unions filed actions in the district court for injunctions to compel arbitration. ATE and the IBT filed such action in the United Stated District Court for the Central District of California while AFA sought relief in the United States District Court for the District of Columbia. In all instances, the district courts denied the unions the relief requested. However, on appeal, the United States Court of Appeals for the Ninth Circuit, on March 31, 1987, [293] ordered the IBT and Western to "select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreement." The merger was also enjoined. *IBT* v. *Western Air Lines, Inc.*, Civil No. 87-5657 (9th Cir., March 17, 1987). A similar ruling regarding Western and ATE was made in *ATE* v. *Western Air Lines, Inc.*, Civil No. 87-5667 (9th Cir. March 17, 1987). AFA unsuccessfully appealed the decision of the District Court to the Circuit for the District of Columbia.

On April 1, 1987, the Honorable Sandra Day O'Connor, the Circuit Justice for the Ninth Circuit, stayed the orders of the Ninth Circuit pending the filing and disposition of a petition for certiorari to review the judgment of the Ninth Circuit. A Petition for Writ of Certiorari was filed by Delta on May 20, 1987.

CONTENTIONS

Delta

Delta contends that Western merged with it on April 1, 1987, and ceased to exist on that date. Therefore, Delta concludes that the certifications of the Western labor organizations were extinguished or terminated as of April 1, 1987.

Air Line Pilots Association (ALPA)

ALPA which represented pilots on both airlines has not taken a position on this matter.

Air Transport Employees (ATE)

ATE contends that before the Board can resolve the question of a merger, the agency must first decide whether it "has exclusive jurisdiction to resolve disputes over the obligations of carriers under a successorship clause." The organization requests that the Board "proceed to order an arbitration to resolve the interpretation of the successorship clause in the ATE-Western agreement." If the Board decides that it does not have the jurisdiction, ATE argues that the Board should state so in a very definitive manner and also state that the application of the successorship [294] clause in the ATE-Western agreement would not impinge on representation matters which are within the exclusive jurisdiction of the Board. ATE asserts that the Board should state that its certification is "in effect" until the successorship question has been resolved through arbitration or an election has been held. Citing *Continental Airlines*, 10 NMB 25 (1982) for the proposition that the Board has permitted the recognition of two contracts and two labor organizations in a single craft or class pending an election, ATE argues that such action would not circumvent any provision of the Act.

International Brotherhood of Teamsters (IBT)

It is the IBT's position that its certifications cannot be terminated because there are outstanding contractual issues which are outcome determinative and the Board should not terminate certifications without an election. The IBT's position is based on two arguments. First, the IBT argues that due process considerations and relevant Board criteria "counsel" against termination of the union's certifications. In support of this argument, the IBT makes the following points:

1. Factual developments after April 1 would be radically different if the adjustment board [system board] proceeding had not been interrupted and the Union had prevailed.

2. Carriers must be made to understand that an operational integration conducted in violation of outstanding contractual obligations will not furnish grounds for termination of existing certifications.

3. It would violate the Union's due process rights for the Board to give conclusive effect to the Carriers' actions that occurred only because of a legal proceeding in which the Union was not allowed to participate.

[295]

4. It is wrong to allow actions undertaken under a temporary order to have "decisional significance." On this point, the IBT contends that the Carrier's object in this proceeding is to obtain a determination from the Board that the Union's certifications terminated, effective April 1, 1987, so they can conclude that Western's agreements are extinguished. This will enable them to claim that the Teamsters' legal case has been rendered moot by intervening

events, i.e., the Board's decision. Thus, the Ninth Circuit Court of Appeals' judgment and order must be vacated and the case dismissed.

5. Because of the pending litigation, the Board's relevant criteria as developed in *TWA/Ozark* cannot be fairly or accurately applied at the present time.

Second, the IBT argues that the Board should not terminate certifications, thereby allowing represented employees to become unrepresented, without first investigating the employees' representation desires. In this case, termination of certificates is inconsistent with the scheme of the Act because it presumes that a majority of employees in the post-merger craft or class reject representation based solely on the fact that a majority of craft or class employees on the acquiring carrier as it existed prior to the merger, have not selected a representative. Because of the unique circumstances of this case, termination of the certification effectively would constitute decertification.

Association of Flight Attendants (AFA)

AFA believes that the Board should rule that "AFA's certificate should be maintained pending final resolution of AFA's successorship claim." The unresolved question of the survivability of the col- [296] lective bargaining agreement is crucial to any Board determination, it argues.

FINDINGS OF FACT

I.

Delta reports that Western's Federal Aviation Administration (FAA) certificate was surrendered on April 1, and, effective that same day, Delta's certificate was amended to include the former Western operations. Western, according to Delta, ceased to exist as a separate corporate entity when a certificate of Ownership and Merger

was filed with the Secretary of State of Delaware on April 1, 1987.

Delta states that Western is not holding itself out to the public as a single entity. Delta and Western are operating under a single Delta schedule. All Western identification and logo have been removed from Western aircraft and replaced with Delta's name and logo. Complete repainting of the aircraft will be accomplished by the fourth quarter of 1988. Identification changes were made on all ground equipment and Delta alleges that repainting of such equipment was accomplished by July 1, 1987.

Former Western employees now wear Delta uniforms or identification name tags. The labor relations for Western personnel is handled by Delta's Senior Vice President-Personnel. Western's Vice President-Labor Relations was made Delta's Assistant Vice President-Personnel.

There were no Western advertisements after March 15, 1987. Western's reservation system was merged into Delta's on April 1. No tickets have been issued on Western stock since April 1; all Western ticket stock has been destroyed. Former Western airport signs, city ticket office signs, identification materials in aircraft seat pockets, signs on maintenance and reservations facilities were changed from Western to Delta on or before April 1 or within a few days thereafter. Several Western officers have become officers of Delta and two Western directors have become directors of Delta.

II.

[297] Investigation has revealed the following findings concerning the former Western employees. Delta voluntarily provided Western employees with Labor Protection Provisions (LPPS) "no less favorable" than the *Allegheny-Mohawk* Labor Protective Provisions. Titles for all positions at Western have been changed to coincide with the Delta titles so that the positions held by former Western

personnel now are identified by the exact same titles as positions held by all other Delta personnel.

Pilots

Delta's pilots and the former Western pilots have merged seniority lists.

Mechanics and Related Employees

Under Delta's policies with respect to these employees, a seniority list is used only in the event of furloughs or transfers to other stations. For all purposes involving seniority, the employee's date of hire is used.

At Delta's request, the former Western employees and original Delta employees elected committees to negotiate the integration of the seniority lists. On June 17, 1987, the committees reached an agreement on a method for compiling an integrated seniority list. According to Delta, the actual integrated list based upon this agreement "will be compiled in the near future."

Office, Clerical, Fleet & Passenger Service Employees

All ground employees have been integrated and are working under Delta's policies, work rules and operating procedures. Western's general office and flight control functions have been transferred to Atlanta, Georgia, where "the former Western personnel have been consolidated with the original Delta personnel." To the extent that seniority is applicable to agents and clerical personnel, Delta states that such integration "was automatically accomplished" because date of hire is used for all matters governed by seniority.
[298]

Flight Attendants

Delta is presently training the former Western flight attendants for assignments on the Delta aircraft. Such training is required by Federal Aviation Administration

Regulations. The training is conducted base-by-base and commenced on May 4, 1987.

At the present time, the seniority lists of the former Western flight attendants and original Delta flight attendants have not been merged. The former Western and original Delta flight attendants elected committees in an attempt to informally negotiate an integration. Pursuant to the LPPs, the former Western flight attendants requested that the Board furnish a panel of arbitrators for selection of a netural to resolve all outstanding issues. A panel has been furnished. According to Section 13 of the LPP, a final and binding decision shall be rendered within 90 days after the controversy arises.

Instructors

Former Western instructors have been merged at Delta on the basis of date of hire. Some instructors have transferred to Atlanta and others remained in Los Angeles where simulators are located. All of the instructors presently operate under Delta's rules and operating procedures.

Stock Clerks

The stock clerks were reclassified as supply attendants on April 1, 1987. They have been merged with Delta supply attendants on the basis of date of hire. They work under Delta's rules.

Dispatchers

Seniority integration for dispatchers has been agreed to and incorporated into a new contract with the Professional Airline Flight Control Association covering both original Delta and former Western dispatchers.

III.

[299] In reference to the Board's inquiry concerning the status of any grievances filed, Delta states that, on April

1, 1987, it "discontinued" the processing of any grievances with the former Western unions except ALPA. Such actions were based on Delta's interpretation of the *TWA/ Ozark* case. Subject to assurances by the Board that such actions would not result in a finding of recognition of the involved unions, Delta states that it will resume processing "so that no employee will be deprived of any rights to which he or she is legally entitled." Delta proposes to process these grievances in such a way that there will be no recognition of the union for collective bargaining purposes.

Delta will continue system board cases with the same system board procedures in place prior to the merger on the condition that the grievant and the union agree that Delta's actions will not result in any contention that Delta has recognized the union for collective bargaining purposes. The Carrier wants a "specific indication" from the Board that its action will not affect the Board's determination. Delta has notified everyone that it will not take any further action until the Board has ruled on this matter.

Discussion

I.

Pending Litigation

AFA and the IBT request that the Board delay a decision on the matter pending final resolution of the litigation. The Board finds that such a delay in this case would not enhance the Act's purpose of promoting labor stability. Sufficient facts have been presented to warrant determination of the specific issues before this Board.

ATE and AFA have asserted that the Board should state that the certifications are "in effect" pending resolution of the matter in litigation. For reasons stated below on the question of single transportation system, this request is denied.
[300]

II.

Single Transportation System

This is a situation where a merger or acquistion is alleged to have occurred and the surviving carrier is contending that a single transportation system exists. The Board in *Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987), enunciated several factors helpful in determining whether two carriers' operations have been integrated into a single transportation system:

> [T]he Board looks into such practical considerations as whether a combined schedule is published; how the carrier advertises its services; whether reservation systems are combined; whether tickets are issued on one carrier's stock; if signs, logos and other publicly visible indicia have been changed to indicate only one carrier's existence; whether the process of repainting planes and other equipment, to eliminate indications of separate existence, has been progressed.
>
> Other factors investigated by the Board seek to determine if the carriers have combined their operations from a managerial and labor relations perspective. Here the Board investigates whether labor relations and personnel functions are handled by one carrier; whether there are a common management, common corporate officers and interlocking Boards of Directors; whether there is a combined workforce; and [301] whether separate identities are maintained for corporate and other purposes.[1]

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[1] The Board notes that while these factors are applicable in this instance, they may not be controlling in a particular case arising in the future. In fulfilling its responsibilities under Section 2, Ninth, the Board may "pierce the corporate veil for purposes of rational labor-

Applying the above factors to the present factual situation, the Board finds that Western's operations have been merged into Delta. As a result of this merger and the foregoing findings, the Board holds that Western's certificates of representation terminated on April 1, 1987. This holding is based on the present facts as revealed during this investigation including Delta's plans to merge the seniority lists for the flight attendants and the mechanics and related employees thereby effectively and completely merging its operations. The labor organizations and Delta are requested to report to this Board any significant departure from Delta's plans to resolve this matter or any significant change in the facts as presented to this Board. Delta is requested to inform the Board within 90 days of the date of this decision of its progress in completely merging the seniority lists for the flight attendants and the mechanics and related employees.

III.

Delta's Position on Processing Grievances

Delta has stated that it has suspended processing of grievances pending "specific indication" from the Board that the Carrier's actions will not affect the Board's determination. The Board is not in the position to provide such "specific indication". The grievance process arises out of contractual rights and, as such, is outside the jurisdiction of this Board. Accordingly, Delta's request for such "specific indication" is denied. The Board hastens to [302] add that this decision cannot be interpreted as inhibiting the processing of grievances.[2]

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management relations". *See Republic Airlines, Inc. and Hughes Air Corp.*, 8 NMB 49 (1980), and *Offshore Logistics, Aviation Services Division d/b/a/ Air Logistics*, 11 NMB 144 (1984).

[2] The Board finds disturbing any actions by the parties in a merger situation that result in withholding vested contractual rights. In this instance, the Board sees no reason why appropriate disclaimers should not effectively protect the rights involved and the processing of grievances should not be delayed further.

CONCLUSION

Based on the foregoing and a review of the record before it, the Board finds that Western's certificates of representation terminated on April 1, 1987. ATE, AFA and the IBT will each have 60 days from the date of this decision to file a representation application on the combined system supported by a minimum 35% showing of interest. Such showing of interest may be supported in part by the dues-checkoff authorizations previously in effect at Western. Delta is requested to inform the Board within 90 days of the date of this decision of its progress in completely merging the seniority lists for the flight attendants and the mechanics and related employees.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Charles R. Barnes
Charles R. Barnes
Executive Director

APPENDIX J

* * *

86-1855 DELTA AIR LINES, INC., ET AL V. INTL. BHD. OF TEAMSTERS, ETC

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Ninth Circuit to consider the question of mootness. Justice Stevens took no part in the consideration or decision of this case.

* * *

APPENDIX K

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5657; 87-5667
D.C. Nos. CV-86-7921-JMI; CV-86-8032
(Central California)
ORDER

IBTCHWA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., ET AL.,
Defendants-Appellees.

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC.,
Defendant-Appellee.

On Remand from the United States District Court

Filed August 18, 1988

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Cecil F. Poole, Circuit Judges.

COUNSEL

Robert Vogel and Roland Wilder, Jr., Los Angeles, California; Robert A. Bush, Los Angeles, California, for the plaintiffs-appellants.

Scott Kruse, Los Angeles, California, for the defendants-appellees.

ORDER

This matter is before us after the United States Supreme Court vacated our decision in *IBTCHWA, Local Union No. 2707 v. Western Air Lines, Inc.*, 813 F.2d 1359 (9th Cir. 1987), and remanded for consideration of mootness. *Delta Air Lines, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Airline Division*, 108 S. Ct. 53 (1987). The unions originally filed this action to compel Western Air Lines to submit to arbitration of the unions' claim that Western's agreement to merge with Delta Air Lines violated collective bargaining agreements between Western and the unions. The relief sought was an order compelling Western to arbitrate and an injunction prohibiting the merger.

The district court denied the relief, and in an expedited appeal we ordered arbitration and conditionally stayed the merger. Upon the airline's ex parte application to Justice O'Connor, our stay was lifted and the merger took place. Accordingly, none of the relief sought in the original complaint is now available. *See* 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533.3, p. 261 (1984) ("[t]he central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief"). We express no opinion as to the viability of any claims that may be asserted in the post-merger context. None are present in this case.

Accordingly, the appeal is dismissed as moot, and the district court should vacate its decision. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

APPENDIX L

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988
CA 87-00040

No. 87-7040

Association of Flight Attendants, AFL-CIO,
Appellant

v.

Western Airlines, Inc.

BEFORE: Mikva, Buckley and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion of appellee for stay of mandate it is

ORDERED, by the Court, that the motion is granted and the issuance of the mandate of the Court is stayed through September 18, 1989.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

FILED SEP 05 1989

CONSTANCE L. DUPRÉ
CLERK

APPENDIX M

[1] UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

OPINION AND ORDER 87 CIV. 6694 (PKL)

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO

Plaintiff,

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN CORPORATION,

Defendant.

APPEARANCES

O'Donnell & Schwartz
60 East 42 Street
New York, N.Y. 10165
David B. Rosen, Esq., *of counsel*

Attorneys for Plaintiffs

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Richard Schoolman, Esq., *of counsel*

Attorneys for Defendants

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[2] LEISURE, *District Judge*,

Plaintiff, Flight Engineers' International Association ("FEIA" or the "union"), moves for summary judgment against defendants, Pan American World Airways, Inc. ("PAWA") and Pan American Corporation ("Pan Am Corp."). The complaint charges that the defendants have violated the Railway Labor Act, 45 U.S.C. § 151, *et seq*, and FEIA's collective bargaining agreement by refusing to arbitrate what FEIA describes as a contract dispute. Defendants have cross-moved to dismiss FEIA's complaint for lack of subject matter jurisdiction.

As indicated below, the defendants' motion to dismiss for lack of subject matter jurisdiction is granted. Therefore, the Court does not reach the plaintiff's motion for summary judgment.

In evaluating a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a court may consider evidentiary matters presented by affidavit or otherwise, and is not restricted to the face of the pleadings. *Kamen v. American Tel. & Tel. Co.*, 792 F.2d 1006, 1011 (2d Cir. 1986). *See also Exchange Nat. Bank of Chicago V. Touche Ross & Co.*, 544 F.2d 1126, 1130-31 (2d Cir. 1976). Consideration of extraneous materials does not convert a motion under Fed. R. Civ. P. 12(b)(1) into a Fed. R. Civ. P. 56 motion. *Kamen, supra*, 791 F.2d at 1011.

A motion to dismiss under Rule 12 must be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." [3] *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (*citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *Rauch v. RCA Corp.*, 861 F.2d 29 (2d Cir. 1988); *Morales v. New York State Department of Corrections*, 842 F.2d 27, 30 (2d Cir. 1988). The Court must accept the pleader's allegations of fact as true, liberally construe those allegations, and make such reasonable inferences as may be

drawn in its favor. *Dahlberg v. Becker*, 748 F.2d 85, 88 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Murray v. City of Milford, Connecticut*, 380 F.2d 468, 470 (2d Cir. 1967). *See also Scheuer, supra* at 236; *Pross v. Katz*, 784 F.2d 455, 457 (2d Cir. 1986). On a motion to dismiss, the Court must "determine whether the facts set forth justify taking jurisdiction on grounds other than those most artistically pleaded." *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 558 (2d Cir. 1985). The following statement of the relevant facts is based both on the pleadings and the affidavits submitted in connection with the motions, but the determinative question, for present purposes, raises a pure issue of law.

Background

PAWA is an international airline, and a wholly-owned subsidiary of defendant Pan American Corp. FEIA is the exclusive collective bargaining representative of PAWA's Operations Training Instructors ("OTI's"). FEIA obtained its representative status through a certification issued by the National Mediation Board in 1968. *See* Article 1(A) of the Collective Bargaining Agreement (the [4] "Agreement"), attached as Exhibit A to First Amended Complaint (the "Complaint").

Article 1(B) of the Agreement contains what is often called a "scope" clause; this agreement's scope clause requires PAWA to utilize FEIA-represented OTI's employed by PAWA whenever PAWA performs training of, *inter alia*, pilots, flight attendants, and ground personnel. The Agreement specifically provides that "OTI's by component group, shall exclusively perform the instructional work which is conducted by the Company requiring the services of an Instructor."

In addition to the original Agreement, a letter dated February 19, 1986 was signed by FEIA, PAWA, and Pan Am Corp. and was subsequently appended to the Agreement as Appendix U. That letter stated in relevant part:

> Pan Am Corporation, parent of Pan American World Airways, Inc., agrees that it or any successor to it will be bound by Article I of the Pan American World Airways, Inc.—FEIA collective bargaining agreement covering Operations Training Instructors in the same manner as if references to Pan American World Airways, Inc., in Article I read Pan American Corporation.

In April 1986, after the Agreement was supplemented by the above noted letter, Pan Am Corp. purchased Ransome AirLines, Inc. ("Ransome"), a regional airline. Prior to the acquisition, Ransome had been an independent carrier, unaffiliated with either of the defendants. Subsequent to the acquisition, Ransome became, like PAWA, a wholly-owned subsidiary of Pan American Corp. In October 1986, Ransome's name was changed to Pan American Express, Inc. ("Pan Am Express.")

[5] After being acquired by Pan Am Corp., Ransome continued to utilize its *own* employees, not PAWA-employed/FEIA-represented OTI's, to conduct training for its own pilots, flight attendants, and ground personnel. Of the approximately 16 Ransome employees training other Ransome employees, some are represented by the Independent Union of Flight Attendants, some by the Air Line Pilots Association, and some are un-represented. *See* Affidavit of David C. Reeve, sworn to on December 6, 1988, ¶ 2-3.

The FEIA took the position that PAWA and Pan Am Corp. violated Article I(B) of its agreement by failing to utilize FEIA represented OTI's to train Ransome personnel. FEIA consequently filed its initial grievance and sought to refer the grievance to a five man Board of Adjustment, as provided by Article 23 of the Agreement. As a remedy, FEIA sought the assignment of work to FEIA-represented OTI's, as well as damages. PAWA responded by denying FEIA's grievance, and declined to submit to arbitration by the Board of Adjustment. PAWA

stated that it would submit to arbitration by the Board of Adjustment only if compelled to do so by court order. *See* Complaint ¶ 13-15. FEIA, in turn, filed this action.

Following the decision of a similar case, *IUFA v. Pan American World Airways, Inc.*, 664 F. Supp. 156 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988), decided in PAWA's favor, FEIA amended its grievance. The amended grievance eliminated any claim to the work, and sought only the money its PAWA-employed OTI's would have earned if allowed to train Ransome personnel. PAWA stood by its belief [6] that the grievance was not arbitrable, and reiterated its position that it would not arbitrate before the Board of Adjustment, absent a court order to do so. Subsequently, FEIA filed the First Amended Complaint in this Court, seeking only damages.

Underlying PAWA's refusal to arbitrate the dispute is PAWA's position that the Board of Adjustment lacks jurisdiction to decide the grievance. PAWA claims that representational issues, namely, whether two related airlines will be treated as a single carrier for representation purposes, and what should be the effect of one carrier's collective bargaining agreement with a union when that carrier acquires or becomes affiliated with a second carrier, are implicated. When representation issues are involved, the exclusive statutory decision-making authority of the National Mediation Board is invoked. The issue now before the Court is whether the exclusive jurisdiction of the National Mediation Board over "representational disputes," pursuant to §2 Ninth of the Railway Labor Act ("RLA"), 45 U.S.C. §2 Ninth, precludes resolution of the dispute by a Board of Adjustment acting pursuant to §204 of the RLA, 45 U.S.C. §1984 and Article 23 of the parties' collective bargaining agreement.

Discussion

This action involves the threshold jurisdictional question of which forum will initially entertain the dispute. FEIA

claims that the present conflict with the defendants is a "minor" dispute, and under the statutory resolution scheme of the RLA, the Court should [7] therefore compel PAWA to submit to arbitration before the Board of Adjustment. PAWA, while agreeing that the dispute is minor, argues that the dispute is also representational. As such, it would have to be resolved by the National Mediation Board, and the Court would consequently lack subject matter jurisdiction.

A brief review of the tripartite dispute resolution scheme established by Congress in the RLA is necessary for the resolution of the jurisdictional question presented by this case. The RLA regulates labor relations on the nation's railroads and airlines. The statute defines three types of labor disputes, and establishes a distinct resolution procedure for each type of dispute.

"Minor" disputes concern the application or interpretation of an existing collective bargaining agreement. *See* 45 U.S.C. § 184. These disputes are "committed to a grievance-arbitration process" before an authorized system board of adjustment. *See, e.g., IUFA v. Pan American World Airways, Inc.*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988). "Major" disputes involve the formation of collective bargaining agreements, and the resolution of such disputes proceeds according to conference and mediation procedures, pursuant to section 6 of the Act. *See* 45 U.S.C. §§ 156, 181. Neither party contends that the present dispute is "major."

Finally, "representation" disputes involve the definition of a bargaining unit, and the determination of employee collective bargaining representatives. "Representation" disputes include whether two related carriers will be treated as one for [8] representation purposes, and whether a craft or class must be system-wide or may be split for representation purposes. *See, IUFA, supra*, 664 F. Supp. at 158. Under Section 2, Ninth of the Railway Labor Act,

45 U.S.C. § 152 Ninth, the National Mediation Board has exclusive jurisdiction over all representation disputes.

In deciding whether a particular labor dispute is minor, major or representational, a court is guided by certain widely accepted principles. Justice O'Connor, sitting as a Circuit Justice, observed that:

> [t]he great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.

Western Airlines v. Intern. Broth. of Teamsters, 480 U.S. 1301, 1305 (O'Connor, Circuit Justice 1987).

It is also generally recognized that what may be characterized as a "minor" dispute over the interpretation of a contract may also implicate concerns which are representational in nature. The proper course for a court to follow in such circumstances is to allow the National Mediation Board "alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Int. Bro. of Teamst. Etc. (Air. Div.) v. Tex. Int. Air.*, 717 F.2d 157, 164 (5th Cir. 1983). *See also Western Airlines*, *supra*, 480 U.S. at 1305. Moreover, even though a representational dispute may be murky, its presence, together with the traditionally narrow role of the courts in enforcing the RLA, requires the conclusion that the Court lacks subject matter [9] jurisdiction over the action. *Air Line Pilots Ass'n v. Texas Intern. Airlines*, 656 F.2d 16, 24 (2d Cir. 1981).

Both parties recognize that many of these same issues, involving these same entities, were resolved by the Court in *IUFA*, *supra*, 664 F. Supp. 156. This action largely turns on the degree that the factual and legal principles here are the same, or distinguishable, from that case. In

IUFA, a flight attendant's union brought an action against a subsidiary airline (PAWA) and its parent company (Pan Am Corp.), alleging that they violated the Railway Labor Act and a collective bargaining agreement by refusing to arbitrate a contract dispute. The District Court, Sand, J., granted the defendants' motion to dismiss for lack of subject matter jurisdiction. The Court held that the union's claim that flight attendants on the union's seniority list had the right to perform work on flights of another subsidiary airline, which was then being performed by unrepresented employees, involved a representation dispute and, consequently, the exclusive jurisdiction of the National Mediation Board. The Second Circuit subsequently affirmed the District Court's decision.

Demand for Work Versus Claim for Damages

Plaintiff's attempts to distinguish *IUFA* and the present case ultimately turn upon the notion that seeking contractual damages calls for a different result than seeking the right to perform the work; that representational issues are not implicated in the [10] former action, while they may be in the latter.[1] The Court does not find this distinction determinative, and it does not strike at the essence of the *IUFA* opinion. The *IUFA* Court stated, "[i]n essence. . . [t]he IUFA flight attendants in this case claim, just as the pilots in *Air Line Pilots Ass'n v. Texas Intern. Airlines*, 656 F.2d 16 (2d Cir. 1981) claimed, that work on a related carrier should be assigned to them." That same basic question underlies any claim for past damages here; the union claims that work on a related carrier should have been assigned to them.

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[1] The Court notes that plaintiff's original complaint did not make any allusions to a distinction between damages and demanding the work itself. FEIA demanded both the work and damages. After the *IUFA* decision, plaintiff amended its complaint to make the claim for damages alone.

Plaintiff seeks to isolate the damage issue from a determination of representation, but the inquiries are inextricable. In order to determine whether the plaintiff is entitled to damages, the court must first conclude that the union is entitled to the work. Deciding the representation issue is a necessary predicate to determining whether a contractual remedy of damages is appropriate.

The *IUFA* Court highlighted several factors that are indicative of representational concerns. First, when the application of previously obtained certification by a union to a newly acquired subsidiary is not clear, a representation issue may be said to exist. Second, whether two related carriers should be treated as a single carrier for representational purposes involves a matter [11] within the National Mediation Board's jurisdiction. *IUF.*1, *supra*, 664 F. Supp. at 158.

FEIA's attempts to show the irrelevancy of the aforementioned factors to the present case in fact demonstrate that FEIA's postulated distinction between damages and injunctive-type relief is not meaningful. First, FEIA argues that in *IUFA*, but not in the case at hand, the result of the implementation of a contractual provision was the reassignment of all of one bargaining unit's work to another, which determined all questions about the representation of the first unit by extinguishing it. It is clear, however, that an award of damages here would effectively require the same determination, namely, that the FEIA bargaining unit has a superior and controlling right to the work. An award of the damages sought here would have the same practical effect on settling representation issues, and extinguishing the possibility of a separate Ransome bargaining unit.

Second, FEIA notes that the *IUFA* Court had to make a preliminary determination of whether the Ransome flight attendants should be considered to be on the Pan Am Seniority List, in order to determine whether any Ransome

employees needed to be displaced. Again, that same essential determination, whether Ransome workers have a right to be considered for the work, is necessary in the case at hand. To grant the damages which the plaintiff seeks, the Court must resolve the right to the work against the Ransome employees.

Plaintiff also looks to the Seventh Circuit decision in *Hutter* [12] *Construction Co. v. Local 139*, 862 F.2d 641 (7th Cir. 1988) to justify its argued distinction between a demand for work and for damages. That case does not support plaintiff's attempt to gloss over the representational issues raised in this dispute. The Court initially notes that *Hutter* arises in an entirely different statutory context than the case at bar. It has been true for some time that, under the National Labor Relations Act, certain contract interpretation questions and some related questions (*e.g.* "unfair labor practice" or "jurisdictional" claims), normally reserved for resolution by the National Labor Relations Board, may be resolved in separate forums simultaneously. *See, e.g., Local Union 33*, 289 NLRB No. 167, 129 LRRM 1311, 1314 (1988). Under the RLA, however, there is no such thing as an "unfair labor practice" or a "jurisdictional" claim, and the FEIA does not indicate any valid authority under the RLA for violating the National Mediation Board's exclusive jurisdiction by submitting representational issues, even when such issues are intertwined with contractual claims, to a Board of Adjustment.

Moreover, even if the different statutory schemes were completely analogous, *Hutter* presented a factual and legal situation different from the case at bar. The *Hutter* court was presented with two concluded determinations; an arbitral award of damages to one union under a contract, and a NLRB determination that a different union had a superior "overall" claim to the work, based on "non-contractual" factors. Under the National Labor Relations Act, disputes between two unions over rights to perform [13] work, or "jurisdictional" disputes, fall under the exclusive

jurisdiction of the NLRB. In determining that the first claim was not jurisdictional, and therefore properly before the arbitral panel, the *Hutter* court noted that the first union would have had an *independent* contractual claim to damages "even if" it had performed the work itself. *Hutter*, *supra*, 862 F.2d at 644. This is directly contrary to the present case; FEIA's claim for backpay here rests squarely upon its failure to secure the work in question.

Additionally, the employer in *Hutter* would have avoided its contractual liabilities by recharacterizing the dispute as purely "jurisdictional," and the Seventh Circuit was concerned by that inequitable result. *Id.* It is not apparent that there would be a similar result in the case before this Court. If FEIA's claim for breach of the scope clause of the collective bargaining agreement still exists after the representational issue is addressed by the National Mediation Board, a Board of Adjustment can resolve that dispute. Finally, the separate nature of the contractual and jurisdictional issues in *Hutter* led that court to conclude that the awards were not inconsistent, and that the jurisdictional determination was not a necessary prerequisite to the award of back pay. As indicated in the discussion above, this is not analogous to the situation presented by this case.

FEIA claims that it is not asking the Board of Adjustment to order a change in the work assignment policy of Pan Am Corp., *see* Plaintiff's Memorandum in Support of Summary Judgment at 14, but [14] it is clear that plaintiff *is* asking the Board of Adjustment to determine that *every time* work is assigned in accord with the existing policy, Pan Am Corp. will incur liability to the FEIA. Characterizing the claim as one for only "past" damages does not alter the practical effect on the prospective work assignments. In order to end double payments, it is likely that PAWA will try to terminate the employment of non-FEIA members, or attempt to recognize the union. A representational stake might even be created, if, by an award

of damages, Ransome employees felt pressure to unionize. FEIA's semantic manipulations do not alter the fact that FEIA is challenging, in a very real way, the work assignment policy of Pan Am Corp., following its acquisition of Ransome.

The case before the Court may not be a traditional dispute over representation, as the union's complaint is best cast in contract terms. But, as the Court in *IUFA* recognized, Ransome employees can have a "representational stake," regardless of the terms in which the representational issues are couched. This representational stake was said to exist in *IUFA* largely because of the presence of the two factors noted above, namely, the question of the application of previously obtained certification to Ransome employees, and whether two related carriers should be treated as a single carrier for representation purposes. Both of these factors clearly exist in the present case.

The Court concludes that this case is not distinguishable from the situation presented in *IUFA*. There, as here, the fundamental [15] organizational and representational rights of workers were involved. This conclusion is consistent with the purposes underlying the Railway Labor Act, which was designed explicitly to protect the rights of employees to organize, or not to organize, as they saw fit. That Act designates the National Mediation Board as the body to insure that such rights are secured. *See, e.g.*, 45 U.S.C. §§151a(2), (3), and 45 U.S.C. §152, Fourth. The District Court in *IUFA* acknowledged that the question there was "close," and this case similarly presents a "close" question. The distinctions between that case and this one, however, are not material or significant for these purposes, and do not alter the conclusion that the dispute involves representational issues. The Court will not divert from the *IUFA* decision.

Conclusion

An issue of representation arises in enforcing the collective bargaining agreement between the FEIA and PAWA. It is settled that a "court may not entertain an action involving . . . a [representation] dispute even if it arises in the context of otherwise justiciable claims." *Int. Bros. of Teamsters v. Tex. Int. Airlines, supra*, 717 F.2d at 159. The National Mediation Board has exclusive jurisdiction in such representational disputes, and the jurisdictional scheme of the RLA does not permit the submission of such questions to a Board of Adjustment, on the hope that the resulting resolution will not be inconsistent with employee representation rights. The National Mediation Board can, [16] as it did subsequent to the *IUFA* decision, accept the union's petition for an election to determine whether it might represent the Ransome OTI's.[2] The National Mediation Board can also clarify the "certification" it issued in 1968 to the FEIA, and determine whether PAWA and Ransome are a "single carrier."

Regardless of what course of action the National Mediation Board takes, it must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented. Only then may the union and the employer, or their arbitrator, establish or interpret contractual working conditions.

[17] For the foregoing reasons, defendants' motion to dismiss on subject matter jurisdiction grounds is granted, and plaintiff's motion for summary judgment is accordingly denied.

SO ORDERED

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[2] In *IUFA* the Circuit Court was satisfied with the subsequent election, in that it underscored the correctness of the District Court's decision that representation issues within the jurisdiction of the National Mediation Board were implicated. *See*, *IUFA*, 836 F.2d at 131.

Dated: New York, New York
July 5, 1989

/s/ Peter K. Leisure
U.S.D.J.

APPENDIX N

STATUTORY MATERIAL

I. Railway Labor Act, Section 2, Fourth; 45 U.S.C. § 152, Fourth

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or their agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

II. Railway Labor Act, Section 2, Ninth; 45 U.S.C. § 152, Ninth.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees des-

ignated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

III. Railway Labor Act, Section 201; 45 U.S.C. § 181

All of the provisions of subchapter I of this chapter except Section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such

carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.